Supreme Court, U. S.
FILED
AUG 14 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN McCARTHY,
APPELLANTS,
v.
COMMONWEALTH OF VIRGINIA,
APPELLEE.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN McCARTHY,
APPELLANTS,
v.
RICHARD H.C. TAYLOR,
APPELLEE.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN McCARTHY,
APPELLANTS,
v.
RICHARD H.C. TAYLOR,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA.

Jurisdictional Statement.

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ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA.

Jurisdictional Statement.

Appellants are the Richmond Newspapers, Inc., and two of its reporters, who, along with all other members of the public,

were banished from a two-day murder trial held on September 11 and 12, 1978, in the Circuit Court of Hanover County, Virginia. Closure was ordered without prior notice or evidentiary hearing, without any showing that the presence of observers threatened the defendant's rights or the orderly conduct of the trial, and without any finding that less drastic means of preventing any perceived threat to such interests were unavailable or inadequate. For the first time in its 243-year history, the Hanover County Courthouse was the scene of a secret trial.[1]

The trial judge, appellee Richard H.C. Taylor, acted on the express authority of Va. Code § 19.2-266, which provides, in pertinent part:

> "In the trial of all criminal cases, . . . the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

[1] It was in this courthouse, built in 1735, that Patrick Henry's name "was to become indelibly written for the first time upon the pages of American history." J. & M. Peters, *Courts of the Richmond Area: A Primer* 22 (1969). Appearing on December 1, 1763, before his father, the presiding justice, Henry aroused a packed courthouse with a philippic against the tyranny of the King and the greed of the clergy. R. Lancaster, *A Sketch of the Early History of Hanover County* 11 (1957). See W. Wirt, *Sketches of the Life and Character of Patrick Henry* 24 (3d ed. 1818) ("The court house was crowded with an overwhelming multitude, and surrounded with an immense and anxious throng, who, not finding room to enter, were endeavouring to listen without, in the deepest attention."). Neither before nor since that colonial public proceeding, so far as appellants have been able to ascertain, had a closed trial ever been held in this courthouse — until the trial in the instant appeal.

Relying on that statute and on the plenary authority it confers on trial courts,[2] the Commonwealth urged the Virginia Supreme Court to reject the petitions for appeal and for writs of mandamus and prohibition filed by appellants.

On July 9, 1979, the Virginia Supreme Court denied appellants' requests for relief from the trial court's order, over appellants' First, Sixth, and Fourteenth Amendment objections. The judgments of the court below were accompanied by brief orders containing no discussion of the merits, but simply citing this Court's recent decision in *Gannett Co., Inc.* v. *DePasquale*, 99 S. Ct. 2898 (1979).

In challenging the judgments below and the validity of the statute whose construction and application those judgments uphold, appellants make no claim that a trial court may never expel an individual to preserve order in the face of specific misconduct that threatens the fairness or decorum of the proceedings. But the Virginia statute invoked here contains no limitation to such instances. Both on its face and as construed and applied, the law confers upon trial courts a sweeping and unbounded authority to ban all observers from a trial for its entire duration — regardless of their orderliness, and regardless of the trial court's capacity to afford the accused a fair trial by other means.

A trial court's authority to order such wholesale exclusion without justification cannot be allowed to stand. Prior decisions of this Court neither require nor suggest any such result and, indeed, compel a contrary conclusion.

[2] Attorney General's Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition 3; Commonwealth's Attorney's Brief in Opposition to Petition for Appeal 5.

Opinions Below.

The opinions of the Virginia Supreme Court refusing appellants' petition for appeal (App. A) and dismissing appellants' petitions for writs of mandamus (App. B) and prohibition (App. C), dated July 9, 1979, are unreported.

Jurisdiction.

This is a consolidated appeal from three final judgments of the Virginia Supreme Court denying appellants, Richmond Newspapers, Inc., and two of its reporters, relief from an order of the Circuit Court of Hanover County barring the public and the press from a two-day criminal trial held on September 11 and 12, 1978.[3] On the morning of September 11, 1978, the day the jury trial began, the trial judge expelled the press and the public from the courtroom on the authority of Va. Code § 19.2-266 (hereinafter sometimes the "Closure Statute"), and directed that the entire trial "be kept clear of all parties except the witnesses when they testify." App. D, at 8a.

On the same day, appellants petitioned the court to permit them to intervene in the case to assert defenses to the court's order closing the trial, which petition the court thereupon granted. App. E, at 18a; see App. F; App. G. At the close of the first day of trial, the court entertained appellants' motion to vacate its order closing the trial. App. E, at 10a; see App. H. Despite efforts by appellants' counsel to contrast the

[3]Because the three cases appealed from the court below involve identical issues, appellants are filing this single Jurisdictional Statement to cover all three cases, pursuant to Rule 15(3) of the Rules of the Supreme Court.

New York Court of Appeals' decision in *Gannett Co., Inc.* v. *DePasquale*, 43 N.Y. 2d 370, 372 N.E. 2d 544 (1977), and to distinguish orders closing pretrial hearings from orders closing entire trials, App. E, at 11a, the trial court rejected all of appellants' constitutional objections and refused to vacate its closure order. App. E, at 16a; App. I. Under that order, the second and final day of the trial proceeded in secrecy to its conclusion.

On September 28, 1978, appellants filed a notice of appeal to the Virginia Supreme Court. App. J. On November 8, 1978, appellants filed a petition for appeal[4]; a petition for a writ of mandamus to enjoin the trial judge "to grant them access to [these] criminal proceedings . . . and to all future criminal proceedings which he may order closed in violation of the Constitution," App. K; and a petition for a writ of prohibition to enjoin the trial judge "from denying them access to [these] criminal proceedings . . . and to all future criminal proceedings which he may order closed in violation of the Constitution." App. L. On July 9, 1979, the Virginia Supreme Court, citing only this Court's newly-issued decision in *Gannett*, refused the petition for appeal, App. A, and dismissed the petitions for a writ of mandamus, App. B, and a writ of prohibition. App. C.

A notice of appeal to this Court from each of those judgments was timely filed with the Clerks of the Circuit Court of Hanover County and the Virginia Supreme Court on August 13, 1979. App. M. This appeal is being docketed within 90 days from July 9, 1979, the date of entry of the final judgments of the Virginia Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

[4]The Petition for Appeal was also the Memorandum in Support of Petitions for Writs of Mandamus and Prohibition. This Petition was appellants' brief in the court below and thus is not included in the Appendix.

Statute Involved.

The text of Va. Code § 19.2-266 is as follows:

> "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.
>
> "A court shall not permit the taking of photographs in the courtroom during the progress of judicial proceedings or the broadcasting of judicial proceedings by radio or television."

Questions Presented.

1. Whether the First, Sixth, and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as construed to authorize the total exclusion of the press and the public from an entire criminal trial.
2. Whether the First, Sixth, and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as construed to give trial judges unfettered discretion to close an entire criminal trial to the press and the public.
3. Whether the First, Sixth, and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as enforced to expel the press and the public from an entire criminal trial, where

> (a) there is no showing or finding that public observation of the proceedings would substantially impair the

> fair trial of the accused, or endanger any other compelling or even significant interest; and
>
> (b) there is no showing or finding that procedures less drastic than secret trial — such as sequestering the jury — are unavailable or are inadequate to protect the interests said to be involved; and
>
> (c) there is no showing or finding that banishing the press and the public from the trial would effectively protect those interests; and
>
> (d) there is no showing or finding that those interests are of sufficient magnitude and are endangered to such a degree as to outweigh the constitutional rights of the press and the public.

Statement of the Case.

The relevant facts were not in dispute below.[5] At the start of John Paul Stevenson's murder trial on September 11, 1978, his attorney moved to exclude the public and the press from the courtroom for the duration of the trial "because I don't want any information being shuffled back and forth when we have a recess as to what — who testified to what." App. D, at 7a. The prosecutor interposed no objection, emphasizing that "[i]t's strictly on defense motion," but also stressing that the matter was "in the discretion of the Court." *Id.* Observing that "the [closure] statute gives me that power specifically," *id.*, the trial court ordered "that the Courtroom be kept clear

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[5]The Attorney General and the Commonwealth's Attorney accepted the statement of facts set forth in appellants' Memorandum in Support of Petitions for Writs of Mandamus and Prohibition 2-5. Attorney General's Memorandum, *supra* n.2, at 1; Commonwealth's Attorney's Brief, *supra* n.2, at 2.

of all parties except the witnesses when they testify." *Id.* at 8a. The court so ruled without conducting any factual inquiry and without making any finding of necessity, and directed the ouster of all members of the public, including appellants Wheeler and McCarthy, reporters for the Richmond Newspapers, Inc. The trial then proceeded in secrecy.

As soon as counsel could be consulted, appellants sought a hearing on a motion to vacate the court's order and to reopen the trial. The court scheduled the motion to follow the close of the day's proceedings. When the reporters appeared for the hearing with counsel, the court ordered them out of the courtroom, stating that "we have to treat this . . . as a part of the original trial that we're in." App. E, at 9a. The court acknowledged to appellants' counsel that excluding the reporters "is going to . . . increase your position in your motion, but I . . . ruled that the Courtroom had to be cleared and I'm going to have to ask the reporters to leave at this time, too." *Id.* at 9a-10a. No other justification for the exclusion of the reporters from the hearing was offered.

Counsel for appellants argued that the court's closure order "constitute[d] a novel form of censorship," *id.* at 11a, in violation of the First, Sixth, and Fourteenth Amendments, insofar as it was issued upon no showing by defendant's counsel nor upon any "evidential finding" by the court, *id.* at 13a, that a fair trial would be jeopardized by the presence of members of the public. Counsel argued further that, even if such jeopardy were to be shown, the trial court would be constitutionally bound to conclude that "sequestration of the jury or changes of venue," *id.*, or other "alternatives which might protect the defendant's rights," *id.* at 14a, were unavailable or would not suffice to safeguard the rights of the accused. Counsel for appellants also emphasized, contrasting the New York Court of

Appeals' decision in *Gannett*, that the exclusion of the press from a pretrial hearing was not at issue. *Id.* at 11a.

Counsel for defendant responded by alluding cryptically to "difficulty . . . with information . . . between the jurors," *id.* at 15a, and letting "information . . . leak out" through the press back to the jury in this "small community." *Id.* Counsel indicated that a different rule might apply "in a big city where you've got three hundred thousand people." *Id.* Defendant's counsel asserted that "[t]here's no way" a court can shield jurors from news about a trial, *id.*, and insisted that the accused's right to a fair and impartial trial "supersedes all other rights." *Id.*

Having heard these arguments, the trial court offered its own impression that, given the court's "layout," "having people in the Courtroom is distracting to the jury." *Id.* at 16a. The court added that "maybe that's not a very good reason" to close a trial. *Id.* The court also noted that three previous attempts to try the defendant had failed, *id.*,[6] and expressed the view that, this time, every step should be taken to assure that "the . . . rights of the defendant are [not] infringed in any

[6]In July 1976, defendant John Paul Stevenson was convicted in the Hanover County Circuit Court of the second-degree murder of a local hotel manager. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S.E. 2d 779 (1977). In October 1977, the Virginia Supreme Court reversed his conviction and remanded the case for a new trial, holding that certain evidence introduced against him at trial was inadmissible. *Id.* In May 1978, Stevenson's retrial before appellee Taylor, circuit court judge, ended in a mistrial when a juror asked to be excused after the trial had begun and no alternate juror was available. *Richmond News Leader*, May 31, 1978, at 59, col. 1. In June 1978, Stevenson's second retrial, again before appellee Taylor, also ended in mistrial. *Richmond News Leader*, June 7, 1978, at B-6, col. 1. Neither appellee Taylor, nor defense counsel, nor the prosecution would say why the mistrial had been declared. *Id.* According to one account, "the mistrial declaration involved a prospective juror who had read about Stevenson's trial in a newspaper and had proceeded to tell other prospective jurors about the case before the trial began yesterday." *Id.*

way . . .." *Id.* The court then stated that it was "inclined to go along with the defendant's motion." *Id.*

Thus, the trial continued in secret the next day. What transpired may only be inferred from a one-page order signed by the trial judge on September 12, 1978. App. N. That order indicates that the defendant moved unsuccessfully for a mistrial — although there is no hint of the grounds for the motion, and no clue as to why the court neither granted nor otherwise disposed of it.[7] The order also states that, at the close of the Commonwealth's case, defense counsel moved to strike the Commonwealth's evidence "on grounds stated to the record." App. N. Again, the substance of these grounds remains secret. The order does report that the motion was sustained — but the reason, once again, is not supplied. Thus, in the midst of the defendant's fourth trial in 1978 for a murder allegedly committed in 1976, the court, having stricken the case against him, declared the accused "not guilty of murder, as charged in the indictment, and he was allowed to depart." *Id.* The next morning's newspapers could report only that the defendant had been set free.[8]

The Questions Are Substantial.

This appeal presents the Court with a ripe opportunity to determine whether its decision in *Gannett Co., Inc.* v. *DePas-*

[7]It is clear that much may sometimes turn, for purposes of double jeopardy, on why a mistrial is declared or denied. See, e.g., *Arizona* v. *Washington*, 434 U.S. 497 (1978); *Illinois* v. *Somerville*, 410 U.S. 458 (1973); *United States* v. *Jorn*, 400 U.S. 470 (1971).

[8]To say much more in such circumstances, on the basis of interviews with jurors, witnesses, or the parties, could well expose the press to crippling liability. See *Wolston* v. *Reader's Digest Ass'n, Inc.*, 99 S. Ct. 2701, 2707-08 (1979) (one does not become a public figure, for purposes of comment regarding a jury verdict, by becoming involved in criminal conduct).

quale, 99 S. Ct. 2898 (1979), may be invoked to sanction the wholesale exclusion of the public and the press from entire criminal trials — to install a regime of secret prosecutions alien to our history and our traditions.[9]

When this Court decided *In re Oliver*, 333 U.S. 257 (1948), it was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *Id.* at 266 (footnote omitted).[10] And when this Court decided *Gannett* just last month, it "cite[d] no case where the public [had] been totally excluded from all of a trial or all of a pretrial suppression hearing." 99 S. Ct. at 2931 n.11 (Blackmun, J., concurring in part and dissenting in part).

Although some cases of exclusion from pretrial hearings were to be expected in the wake of *Gannett's* ruling that such exclusion is permissible, cases of exclusion from entire trials should not have followed. For *Gannett* did not involve, and nothing in *Gannett* upheld, the total closing of a complete

[9]On September 12, 1978, defendant Stevenson was found not guilty, after the trial judge granted a defense motion to strike the evidence and dismissed the jury. App. N. That circumstance does not moot this appeal, however, just as the guilty pleas of defendants in *Gannett* did not moot that appeal. See 99 S. Ct. at 2904-05 & n.4. Like an order closing a pretrial hearing, an order closing a criminal trial "is too short in its duration to permit full review. . . . The order is 'by nature short-lived.'" *Id.* at 2904, quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976). Cf. *Gannett*, 99 S. Ct. at 2915 ("[I]t would be entirely impractical to require criminal proceedings to cease while appellate courts were afforded an opportunity to review a trial court's decision to close proceedings.") (Powell, J., concurring). Moreover, as in the case of petitioner in *Gannett*, "it is reasonably to be expected that [appellants] . . . will be subjected to similar closure orders entered by [Virginia] courts in compliance with the judgment[s] of that State's [Supreme Court]." *Id.* at 2904. Thus, "the controversy is not moot." *Id.*

[10]The only exceptions discovered by the Court were courts martial. 333 U.S. at 266 n.12. Even in juvenile proceedings, the Court observed, "it has never been the practice wholly to exclude parents, relatives, and friends . . .." *Id.*

criminal trial. On the contrary, as the majority pointedly noted, "[t]he whole purpose of [pretrial suppression] hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury." *Id.* at 2905. By contrast, the "whole purpose" of a *trial* is to set before the jury, as a "representative cross section" of the public, *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975), evidence already screened for its admissibility and reliability. Publicity thus promotes the aims of a trial just as it may defeat the aims of a pretrial hearing. As the Court said in *Gannett*, "inadmissible prejudicial information about a defendant" aired in "pretrial suppression hearings" might prove impossible to keep from potential jurors, while such "information . . . can be kept from a jury by a variety of means" after "commencement of the trial itself . . .." 99 S. Ct. at 2905 (footnote omitted). Thus, the Chief Justice emphasized in his concurring opinion that *Gannett* resolved only the constitutionality of excluding the press and the public from a "*pre* trial hearing." *Id.* at 2913 (Burger, C.J., concurring) (emphasis in original). Cf. *id.* at 2914 n.1 (Powell, J., concurring). At the very least, whether *Gannett* can properly be enlarged to permit secret criminal trials presents a substantial federal question requiring this Court's plenary consideration.

The four Justices who dissented in *Gannett* expressed their doubt that, as of the date of the Court's decision, any cases existed entirely excluding the public and the press from trials. *Id.* at 2931-32 n.11 (Blackmun, J., joined by Brennan, Marshall, White, JJ., concurring in part and dissenting in part). Whether the instant case represents the first exception to the dissent's surmise is unclear. It surely does not represent the last. For the extension of *Gannett* to encompass entire

criminal trials has not been the mistake of the court below alone.[11]

As this case demonstrates, the need for this Court's guidance is already urgent. No matter how many courts follow the precedent set below, another appeal squarely raising this crucial issue may not soon reach this Court. Neither reporters nor other observers can automatically be assumed to have the resources to mount repeated challenges to closure orders on behalf of the excluded public. Thus, some secret trials never contemplated by *Gannett* but decreed on its supposed authority will evade challenge entirely. And, if such challenges were nonetheless to become frequent, the orderly administration of justice would suffer — especially if insistent intervenors were to succeed in "requir[ing] criminal proceedings to cease while appellate courts . . . review[ed] . . . decision[s] to close pro-

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[11] Before one month had passed from the date of the Court's decision in *Gannett*, serious breaches in the public's right of access to criminal trials had begun to appear. One rape trial has been entirely closed. *State* v. *Hicks*, No. 5003 (Md. Cir. Ct.). A murder trial has been closed to the press — although not to the public. *State* v. *Woomer*, No. 79-GS-26-203 (S.C. Cir. Ct.) (jury selection proceeding); cf. *People* v. *Warth*, No. 79-C13 (W. Va. Cir. Ct.) (kidnapping) (pretrial suppression hearing). Another rape trial has proceeded behind the screen of a gag order. *State* v. *Giles*, No. CC79-090-091 (Ala. Cir. Ct.) (on motion of judge) (alleged possible prejudice to co-conspirator in separate trial). Closure motions are pending in two federal district courts, *United States* v. *Powers*, No. 79-26 (S.D. Iowa) (opposed by prosecution); *United States* v. *Benson*, 79-30054 (M.D. Tex.) (bribery trial of former public official), and in two cases trial closure motions have been refused. *People* v. *Bartowsheski*, No. 79CR-516 (Colo. Dist. Ct.) (opposed by prosecution) (jury instructed not to read or listen to news accounts of trial); *People* v. *Angus*, No. 104-69-78 (N.Y., Albany County Ct.) (alleged possible prejudice to witness in future trial). This burgeoning series of cases strongly suggests that the unbounded authority conferred by the Virginia Closure Statute is far from unique. As the *Gannett* Court itself noted, many states have statutes that could be similarly construed. 99 S. Ct. at 2910 n.19. And the questions posed would not be materially different were closure ordered pursuant to purely judge-made rules.

ceedings." *Gannett*, 99 S. Ct. at 2915 (Powell, J., concurring). Such burdens, heavy enough when pretrial hearings are disrupted, will be heavier still if jury trials themselves become fragmented by incessant interlocutory appeals.

This appeal thus affords a timely opportunity for the Court to avoid all such unwelcome consequences. Moreover, because the public right to observe the conduct of criminal trials is uniquely important, and because the deprivation of that right is irreparable, it is vital to prevent any further misguided orders closing trials — not simply to criticize or condemn them after the fact. Thus Justice Powell's call for standards "for the guidance of trial courts," *id.* at 2915, a call anticipated by the trial court in this very case, App. E, at 16a, was prescient indeed. Unless this Court promptly provides such guidance, *Gannett* will be repeatedly misapplied to deprive the press and the public of timely access to criminal trials whose progress is of vital interest to all citizens.

I. The Virginia Closure Statute, Insofar As It Permits The Total Exclusion Of The Press And The Public From An Entire Criminal Trial, Violates The First, Sixth, And Fourteenth Amendments.

As construed by the courts below, the Closure Statute permits a trial court to order the wholesale exclusion of the press and the public for the duration of a criminal trial.[12] On its face, such an invocation of censorial power cannot coexist with the First, Sixth, and Fourteenth Amendments.

[12] Although its words might have been read more narrowly, Va. Code § 19.2-266 comes to this Court "as authoritatively interpreted" by the Virginia Supreme Court's action in this case. See *Cox* v. *Louisiana*, 379 U.S. 536, 545 (1965). As so interpreted, it is "unconstitutionally broad in scope." *Id.*

A. *Public Access to Criminal Trials Is a Fundamental Constitutional Right.*

Writing separately in *Gannett*, Justice Blackmun, joined by Justices Brennan, White, and Marshall, persuasively grounded the right of public access to criminal trials in the Sixth Amendment's Public Trial Clause, as applied to the states through the Fourteenth Amendment. 99 S. Ct. at 2922-33 (concurring in part and dissenting in part).[13] With equal force, Justice Powell located that right in the First and Fourteenth Amendments and in the protection they afford those who seek "information needed for the intelligent discharge of [their] political responsibilities." *Id.* at 2914-15 (concurring opinion), quoting *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).[14]

Even if there were no agreed-upon textual source for such a right, however, its existence draws vital support from the First and Sixth Amendments and has been confirmed by its long and unbroken observance. Like many other rights of similar nature — such as the right to vote in state elections, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 665 (1966); the

[13] The contrary view taken in the majority opinion, *id* at 2905-09, was dictum, for *Gannett* involved only the closure of a *pre*trial suppression hearing. The Chief Justice, whose concurring vote was decisive, was careful to insist that nothing beyond a pretrial hearing was at issue. *Id.* at 2913.

[14] Although there may well be governmental proceedings and institutions to which there exists no right of public access, this Court has never squarely decided whether such a right may be found in the First and Fourteenth Amendments with respect to a criminal trial — a proceeding the Court has described as a "public event," saying that "[w]hat transpires in the court room is public property." *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). Cf. H. Kalven, "The Concept of the Public Forum: Cox v. Louisiana," 1965 Sup. Ct. Rev. 1. In *Gannett*, only Justice Rehnquist took the position that the First and Fourteenth Amendments secure no such right. 99 S. Ct. at 2918 (concurring opinion).

right to travel interstate, *United States* v. *Guest*, 383 U.S. 745, 757-59 (1966); the right not to be convicted without proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 361 (1970); or the right to live with the family members of one's choice, *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503-04 & nn.10-12 (1977) — the right of public access to criminal trials can be derived, even without explicit constitutional referents, from its central role in the "Anglo-American regime of ordered liberty," *Duncan* v. *Louisiana*, 391 U.S. 145, 149-50 n.14 (1968) — a role undeniably revealed in "this Nation's history and tradition." *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 503 (footnote omitted). Cf. *Duncan* v. *Louisiana*, *supra*, 391 U.S. at 148-49 & n.14; *Johnson* v. *Louisiana*, 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring).

No less than the right to vote, the right of access to criminal trials must be "regarded as a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). No less than the right to proof beyond a reasonable doubt, the right of access to criminal trials has won "virtually unanimous adherence" throughout our history, reflecting "a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, *supra*, 397 U.S. at 361-62, quoting *Duncan* v. *Louisiana*, *supra*, 391 U.S. at 155. Like the reasonable doubt requirement, our system of open trials has proven itself "indispensable to . . . the respect and confidence of the community in applications of the criminal law." *In re Winship*, *supra*, 397 U.S. at 364.[15]

As with the right of interstate travel, there is thus no need "to ascribe the source of this right . . . to a particular constitutional provision." *Shapiro* v. *Thompson*, 394 U.S. 618,

[15] That this cannot as readily be said of access to *pre*trial proceedings may help explain not only the result in *Gannett* but also the more focused search in that case for a point of reference in the First or Sixth Amendment.

630 (1969) (footnote omitted). "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). "The tacit postulates" of the constitutional plan "are as much engrained in the fabric of the document as its express provisions." *Nevada* v. *Hall*, 99 S. Ct. 1182, 1195 (1979) (Rehnquist, J., dissenting).

Thus, the right of the individual to attend and observe any criminal trial, subject only to narrowly focused restraints to assure fairness and order, is "of constitutional dimension because [its] derogation would undermine the logic of the constitutional scheme," *id.* at 1197, a logic that relies crucially upon the publicity and openness of the state's ultimate confrontations with its citizens. Whatever its textual source, that right is confirmed by our "shared experience and common understanding," *id.* at 1194, an experience and understanding informed but not wholly defined by the First and Sixth Amendments.

Our "common understanding" makes it clear that we dare not rely solely on appellate review to expose abuses of judicial or prosecutorial power. Some secret trials, like the one in the instant case, will end in nonappealable acquittals. Even where appeals are possible, much judicial and prosecutorial misconduct will either be insulated from correction by such doctrines as harmless error, or become visible only through the pattern revealed by a series of cases. Nor can we depend wholly on the preparation of post-trial transcripts to bring the truth to light. Few can afford the expense, especially after a long trial. Moreover, the delay alone will often make the record stale, and matters like credibility are forever lost when only a cold transcript is available. Indeed, secret trials automatically defeat the right of neighbors, friends and relatives —

not only the accused's but the victim's — to judge for themselves who was lying and who was telling the truth.

More fundamentally, our "shared experience" teaches that the very spectre of secret trials is a source of public terror. Experience teaches, too, that secret trials encourage corruption and abuse of power, spawning both the reality and appearance of manipulation.[16] By avoiding secret trials, we have not only minimized these evils; we have also become known to the world as an informed people. Indeed, our political and legal history has been significantly shaped by the criminal trials our people have watched. Imagine an America in which secret trials had been held in the prosecutions of Aaron Burr, John Peter Zenger, or John Thomas Scopes; of John Wilkes Booth, James Earl Ray, or Sirhan Sirhan; of the Chicago Eight, the Watergate Seven, or the Wilmington Ten.

Nor need one focus on such historic trials to recognize the crucial importance of public access to criminal trials even in wholly non-political contexts. The case involved in this appeal makes the point with force: A man is tried in a small town for the murder of a local hotel manager; the case drags through three open trials; then a fourth trial is held — behind closed doors. Suddenly, the jury is excused and the defendant set free. Can there be any doubt that not only those close to the deceased, but all members of the community, are bound to feel deprived of a fundamental, time-honored right?

Given the well-founded "traditional Anglo-American distrust for secret trials," *In re Oliver*, 333 U.S. 257, 268 (1948), we can assure neither the accountability of government, nor any reasonable confidence that the guilty are indeed being punished and the innocent acquitted, if entire criminal trials

[16] Cf. *United States* v. *Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure . . ..").

may be closed. Membership in the political community, given our form of government, thus entails a specially protected "liberty" interest in access to criminal trials — an interest whose abridgment requires "particularly careful scrutiny," *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), an interest that certainly cannot be sacrificed in gross.

B. *The Virginia Closure Statute Violates This Fundamental Right By Authorizing Its Wholesale Abrogation At The Trial Court's Uncontrolled Discretion.*

It is inconceivable as a general matter, and unproven as a matter of record in this case,[17] that the complete expulsion of the press and the public from an entire criminal trial could satisfy a test of "strict and inescapable necessity," *Gannett*, 99 S. Ct. at 2940 (Blackmun, J., concurring in part and dissenting in part), or indeed any other test that places the right of public access above the convenience of secrecy.

No doubt, to maintain order, judges may expel particular persons whose conduct imminently threatens disruption of the proceedings. And it has been argued that some testimony may be so sensitive as to justify the temporary exclusion of the public from the proceedings. *Gannett*, 99 S. Ct. at 2910 n.19; cf. *id.* at 2931-32 n.11 (Blackmun, J., concurring in part and dissenting in part).[18] But expelling orderly reporters and other observers for the entire course of a criminal trial can serve no legitimate interest. A jury trial is by its nature a public event. Unlike the pretrial suppression hearing involved in *Gannett*, a criminal trial is a proceeding in which the accused, the wit-

[17] See Part II, *infra*.

[18] The very fact that the testimony will of necessity be heard by the jury, representing the public, casts doubt on the theory underlying even such limited expulsions.

nesses, and all other trial participants are *already* being observed by a randomly chosen cross-section of the community — by a jury whose members, after the trial is over, will be free to disclose what they have seen and heard.

To justify closing an entire criminal trial would require a showing that fatally prejudicial information about the accused would otherwise reach the jurors themselves. But no such showing is possible — unless one treats all members of the public as potential jurors in every pending case in which a retrial might ever be ordered. As the Court noted in *Gannett*, "[a]fter the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means." 99 S. Ct. at 2905 (footnote omitted). "In addition to excluding inadmissible evidence, a trial judge may order sequestration of the jury or take any of a variety of protective measures." *Id.* at n.5. Since jurors, even if not sequestered under Va. Code § 19.2-264, can be admonished on pain of contempt against reading about or discussing the case during trial, and since a change of venue is always possible even if a retrial is ordered, conducting an entire criminal trial in total secrecy is never justifiable.

But even if some justification could be imagined, the wholesale sacrifice of the public's right of access would at least have to be ordered pursuant to a clear and specific set of statutory or judge-made criteria — not pursuant to an open-ended delegation of discretionary power to trial judges, acting with the equally discretionary acquiescence of the prosecution upon the motion of the accused. See *Cox* v. *Louisiana*, *supra*, 379 U.S. at 557-58; *Saia* v. *New York*, 334 U.S. 558, 560-62 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940); *Lovell* v. *Griffin*, 303 U.S. 444, 450-53 (1938). Cf. *Furman* v. *Georgia*, 408 U.S. 238 (1972).[19] As with uncontrollable discretion generally, that conferred by the Virginia Closure Statute represents both an abdication of the public power to make explicit choices of policy, see *McGautha* v. *California*, 402 U.S. 183, 248-87 (1971) (Brennan, J., dissenting), and an invitation to abridge the rights of would-be trial observers for plainly impermissible and permanently invisible reasons.

[19] That the scheme of Va. Code § 19.2-266 reposes in the accused a power to object to secret trial cannot save it from this constitutional infirmity; from the perspective of the public and the press, this is simply a delegation, to a private party, of unbridled control over a protected right of access. Cf. *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 99 S. Ct. 403, 420 (1978) (Stevens, J., dissenting).

These objections to the Virginia Closure Statute only underscore the pressing need for constitutional guidance recognized by Justice Powell in *Gannett*. 99 S. Ct. at 2915 (concurring opinion). Rather than attempt the enormous, and inevitably disruptive, task of providing such guidance by itself case by case, this Court should hold that states choosing to permit trial judges to close their courtrooms must at least promulgate precise criteria for the exercise of such extraordinary authority. But whether or not the Court takes such a step, this much at least is plain: by authorizing trial courts to use a bludgeon where a scalpel would do, the Virginia Closure Statute violates the First, Sixth, and Fourteenth Amendments.

II. The Virginia Closure Statute, Insofar As It Permits Secret Trials Without Any Showing That So Drastic A Step Is Required To Serve Significant Countervailing Interests, Violates The First, Sixth, and Fourteenth Amendments.

Even if the Virginia Closure Statute were not void on its face as an overbroad delegation of discretionary power to expel all observers from criminal trials, its application on the facts of this case demonstrates its constitutional infirmity. For

no law could validly authorize the trial court's order on these facts. Any law construed to confer such authority is, at least to that extent, unconstitutional.

A. *The Closure Statute Is Unconstitutional As Applied Because It Permits Secret Trials With No Showing That Open Proceedings Would Threaten Any Significant Interest.*

When closure was initially requested on the morning of September 11, 1978, the only reason defense counsel offered was that he did not "want any information being shuffled back and forth when we have a recess as to what — who testified to what." App. D, at 7a. He made no showing that "any information" would be "shuffled back and forth" during recess. Nor did he explain who was to transmit and who was to receive the "shuffled" information, or how the defendant's right to a fair and impartial trial would be endangered thereby. The trial court asked for no such explanation, and required no showing whatever.

With little more justification, the trial court later that day ruled that its closure order would remain in effect for the duration of the trial — over the varied constitutional objections raised by counsel for appellants. To secure this ruling, defense counsel had alluded to "difficulty . . . with information . . . between the jurors" in prior efforts to try the defendant, App. E, at 15a, and had indicated that a secret trial might help him "avoid keep coming back up to the Court and keep having to try this case." *Id.* But the colloquy reveals nothing about what the prior "difficulty" was, why it should be expected to recur, or how it would impair a fair trial. Defense counsel had also voiced concern that jurors might "read the paper or . . . look at television." *Id.* Again, neither the

nature nor the degree of any resulting risk to a fair trial was elaborated.

Whether the court was moved by the vague assertions of defense counsel is impossible to tell. The only consideration adduced by the court in favor of closing the trial was a factor entirely outside defense counsel's presentation: given the courtroom's "layout," the trial court said, "having people in the Courtroom is distracting to the jury." Why that should suddenly have seemed a problem — after the same entirely typical courtroom had been used to conduct public criminal trials for nearly two and a half centuries — was not explained.[20]

Nothing further was shown or even claimed to justify closing the court in this case. By upholding that closure as a permissible exercise of power under Va. Code § 19.2-266, the court below interpreted that statute to permit secret trials even where no significant interest is endangered. Given the fundamental right of public access to criminal trials, see Part I-A, *supra*, a statute so interpreted cannot stand.

B. *The Closure Statute Is Unconstitutional As Applied Because It Permits Secret Trials With No Showing That Less Drastic Measures Are Unavailable Or Insufficient.*

Not even the most generous interpretation of the concerns articulated by defense counsel called for anything more drastic

[20] Part of this courtroom's history is recounted in note 1, *supra*. See also *Court House* 166 (R. Pare ed. 1978); *id.* at Plate 29. Although of modest dimensions, the courtroom's configuration parallels that of literally hundreds throughout the land, many of which have doubtless been patterned upon its classic design. A diagram and a photograph of the courtroom involved in this case are included as Appendices O and P, respectively. That these appendices, which were not before the court below, accurately portray the courtroom has been stipulated by the parties. A copy of the stipulation will be filed with the Court shortly.

than sequestering the jury, see Va. Code § 19.2-264, or perhaps excluding witnesses from the courtroom while not testifying, using the Closure Statute itself. See, e.g, *Yorke* v. *Commonwealth*, 212 Va. 776, 188 S.E. 2d 77 (1972); *Johnson* v. *Commonwealth*, 217 Va. 682, 232 S.E. 2d 741 (1977). See *Gannett*, 99 S. Ct. at 2905 & n.5. Counsel for appellants proposed precisely such measures, and others. App. E, at 13a-14a. Although defense counsel asserted "[t]here's no way" to prevent jurors from reading the papers or watching television, he utterly ignored the device of sequestration. And in ruling that the press and public should be expelled, the trial court did not once refer to the availability or efficacy of the less drastic means that had been suggested.[21]

By upholding closure on this record as a lawful invocation of Va. Code § 19.2-266, the court below construed that statute to allow secret trials even when less drastic alternatives would suffice. Since public access to criminal trials is constitutionally fundamental, see Part I-A, *supra*, no statute so construed can stand.

C. *The Closure Statute Is Unconstitutional As Applied Because It Permits Secret Trials With No Showing That Expelling The Public and the Press Would Prove Effective.*

Banishing the press and the public was a patently ineffectual answer to the concerns voiced by defense counsel in the trial court. That jurors might learn through press reports what others thought about the proceedings remained as great, or as small, a danger after the closure as before, since jurors

[21] Had the courtroom's design truly precluded public trial, but see p. 23 & n.20, *supra*, a change of venue would have been possible. In any event, a fundamental right of public access to criminal trials can hardly be defeated by government's deliberate use of a structure incompatible with such access. Cf. *Bounds* v. *Smith*, 430 U.S. 817, 824-25, 828-30 (1977).

were not prevented from discussing the case with others outside the courthouse. And any danger of prejudicing a possible future jury can hardly have been stilled by closure, since details about the trial could have been spread, by the jurors then impanelled themselves, to prospective jurors in any future trial.

To uphold closure on this record as permissible under Va. Code § 19.2-266 was to construe that statute as allowing secret trials without regard to the efficacy of the secrecy thereby decreed. A statute that sacrifices rights of public access without countervailing benefit is unconstitutional. See *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 565-67 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713, 733 (1971) (White, J., joined by Stewart, J., concurring).

D. *The Closure Statute Is Unconstitutional As Applied Because It Permits Secret Trials With No Attempt To Accommodate The Rights Of The Public And Of The Press.*

Although the trial court at one point noted that cases cited by appellants' counsel suggested a need to "weigh" the competing rights of the accused and the public, App. E, at 13a, defense counsel subsequently insisted that the interests of the accused supersede all other concerns, *id.* at 15a, and the trial court seemingly agreed. *Id.* at 16a. No other premise can explain the decision to conduct a secret trial on this record. Construed to permit that decision, the Virginia Closure Statute unconstitutionally subordinates rights of access to the interests supposedly served by closure. Cf. *Gannett*, 99 S. Ct. at 2912 (trial court "balanced" the competing rights); *id.* at 2917 (Powell, J., concurring) (same); *id.* at 2938-39 (Blackmun, J., concurring in part and dissenting in part) (attempt at accommodating competing interests required). And it bears repeating that no showing was made that these interests were im-

periled in this case, that less drastic means of protecting them were unavailable, or that closing the trial court would in fact protect them.

Conclusion.

The case from which this appeal arises began in the courthouse where Patrick Henry's name "was to become indelibly written for the first time upon the pages of American history." J. & M. Peters, *Courts of the Richmond Area: A Primer* 22 (1969). See note 1, *supra*. To a courthouse "crowded with an overwhelming multitude," *id.*, he there declaimed against the King's tyranny. How different was the trial of John Paul Stevenson, held in the same courthouse — emptied of all observers — more than 200 years later. It would be ironic indeed if the Hanover County Courthouse, long remembered in a brighter light, should find its place in American history as the seat of secret trials — the symbol of a dark period in the annals of justice. This Court's recent decision in *Gannett* need not foreshadow such a result.

For the foregoing reasons, probable jurisdiction should be noted, and the judgments of the court below should be reversed.

Respectfully submitted,

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Appendix A.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of July, 1979.

Richmond Newspapers, Inc., et al., Appellants,

against Record No. 781598

Commonwealth of Virginia, Appellee.

From the Circuit Court of Hanover County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case. *Gannett Co., Inc.* v. *DePasquale*, No. 77-1301, 47 U.S.L.W. 4902 (1979).

A Copy,
Teste:
ALLEN L. LUCY, *Clerk*
By:
RICHARD R. BURIAK,
Deputy Clerk

Appendix B.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of July, 1979.

In Re: Richmond Newspapers, Inc., et al., Petitioners
Record No. 781599

Upon a Petition for a Writ of Mandamus

On November 8, 1978, came Richmond Newspapers, Inc., Timothy B. Wheeler and Kevin McCarthy, by counsel, and filed pleadings praying that a writ of mandamus do forthwith issue, to be directed to the Honorable Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, respondent, compelling him to grant the petitioners access to the criminal proceedings in the case of *Commonwealth of Virginia* v. *John Paul Stevenson*, and for other relief.

Also came the respondent, by counsel, and filed pleadings in opposition to the said petition.

And the court having considered the said petition and pleadings in opposition, is of opinion that the writ of mandamus should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioners the costs expended herein. *Gannett*

Co., Inc. v. *DePasquale*, No. 77-1301, 47 U.S.L.W. 4902 (1979).

A Copy,
Teste:
ALLEN L. LUCY, *Clerk*
By:
RICHARD R. BURIAK,
Deputy Clerk

Respondent's costs:

Attorney's fee $50.00

Teste:

ALLEN L. LUCY, *Clerk*

By: RICHARD R. BURIAK,
Deputy Clerk

Appendix C.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of July, 1979.

In Re: Richmond Newspapers, Inc., et al., Petitioners
Record No. 781600

Upon a Petition for a Writ of Prohibition

On November 8, 1978, came Richmond Newspapers, Inc., Timothy B. Wheeler and Kevin McCarthy, by counsel, and filed pleadings praying that a writ of prohibition do forthwith issue, to be directed to the Honorable Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, respondent, prohibiting him from denying the petitioners access to the criminal proceedings in the case of *Commonwealth of Virginia* v. *John Paul Stevenson*, and for other relief.

Also came the respondent, by counsel, and filed pleadings in opposition to the said petition.

And the court having considered the said petition and pleadings in opposition, is of opinion that the writ of prohibition should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioners the costs expended herein. *Gannett Co.*,

Inc. v. *DePasquale*, No. 77-1301, 47 U.S.L.W. 4902 (1979).

A Copy,
Teste:
ALLEN L. LUCY, *Clerk*
By:
RICHARD R. BURIAK,
Deputy Clerk

Respondent's costs:

Attorney's fee $50.00

Teste:

ALLEN L. LUCY, *Clerk*

By: RICHARD R. BURIAK,
Deputy Clerk

Appendix D.

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

COMMONWEALTH OF VIRGINIA

-*vs*-

JOHN PAUL STEVENSON

TRANSCRIPT of MOTION in the above when heard on *September 11, 1978*, before Honorable Richard H. C. Taylor, Judge.

APPEARANCES:

Patrick R. Bynum, Jr., Attorney at Law, Commonwealth's Attorney for Hanover County, Virginia;

C. Willard Norwood, Attorney at Law of NORWOOD & NORWOOD, 304 West Broad Street, Richmond, Virginia 23229, Counsel for the Defendant;

John Paul Stevenson, the Defendant, in person.

[2] NOTE: At the calling of the case at 10:10 o'clock a.m., the Court Reporter first being duly sworn, the matters are begun as follows, viz:

THE COURT: Mrs. Wright, let the record show that Mr. Stevenson is present; his lawyer, Mr. Norwood, is present; and the Commonwealth's Attorney is present.

Mr. Stevenson has already been arraigned and pleaded not guilty, I believe, Mr. Norwood.

MR. NORWOOD: Yes, Your Honor.

THE COURT: It's not necessary to go through that again, I don't think.

MR. NORWOOD: No, sir.

THE COURT: Are there any preliminary motions before we bring in the jury?

MR. NORWOOD: Uh, there was this woman that was with the family [3] of the deceased when we were here before. She, uh, had sat in the Courtroom. I would like to ask that everybody be excluded from the Courtroom because I don't want any information being shuffled back and forth when we have a recess as to what — who testified to what.

Also, I have no objection to the, uh, jury being just drawn in numerical order according to the list. It's not necessary to go by lot because we only have about twenty-four so we're going to get most of them.

THE COURT: We normally do it by lot. Are you specifically requesting the other way?

MR. NORWOOD: It really doesn't make any difference.

THE COURT: I think that, uh, uh, whichever way ya'll —

MR. BYNUM: I prefer to do it by lot. I think the Clerk has already prepared to do it. You've only got four extra anyway so —

[4] THE COURT: Yes. Do you have any objection to clearing the Courtroom, Mr. Bynum?

MR. BYNUM: Uh, no, sir, I'll leave it to the discretion of the Court. Are you talking about every — are you talking about everyone; the press included? Is that — does your motion extend to them?

MR. NORWOOD: Yes, sir, that would be my motion.

THE COURT: All right, sir.

MR. BYNUM: It's in the discretion of the Court. You know, I — I understand, you know. It's strictly on defense motion.

THE COURT: Yes, sir, well, the statute gives me that power specifically —

MR. BYNUM: Yes, sir.

THE COURT: — and the defendant has made the motion and I'll rule that the Courtroom be kept clear of all parties except the witnesses [5] when they testify.

MR. NORWOOD: Also, Your Honor, I would like to, uh, interrogate the jurors individually.

THE COURT: All right, you want individual voir dire?

MR. BYNUM: Do you want individual voir dire?

MR. NORWOOD: Yes, sir.

THE COURT: Do you have any objection to that, sir?

MR. BYNUM: No, sir.

THE COURT: Okay, we'll do the voir dire individually.

Appendix E.

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

COMMONWEALTH OF VIRGINIA

-vs-

JOHN PAUL STEVENSON

TRANSCRIPT of MOTION in the above when heard on *September 11, 1978*, before Honorable Richard H. C. Taylor, Judge.

APPEARANCES:

Patrick R. Bynum, Jr., Attorney at Law, Commonwealth's Attorney for Hanover County, Virginia;

Alexander Wellford and William F. Etherington, Attorneys at Law of CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL, 1200 Mutual Building, Richmond, Virginia 23219, Counsel for Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy;

C. Willard Norwood, Attorney at Law of NORWOOD & NORWOOD, 304 West Broad Street, Richmond, Virginia 23229, Counsel for the Defendant;

John Paul Stevenson, the Defendant, in person.

[3] NOTE: At the calling of the case at 4:55 o'clock p.m., the Court Reporter having previously duly sworn, the matters are begun as follows, viz:

THE COURT: I think we have to treat this, Mr. Wellford, as a part of the original trial that we're in. I know this is going

to, uh, increase your position in your motion, but I — the Court ruled that the Courtroom had to be cleared and I'm going to have to ask the reporters to leave at this time, too.

MR. WELLFORD: All right, sir.

NOTE: Reporters Wheeler and McCarthy are now leaving the Courtroom.

MR. WELLFORD: If I might tender the motion.

[4] THE COURT: Yes, sir.

NOTE: Motion is now being handed to the Court.

THE COURT: All right, since none of us have seen it, Mr., uh, Wellford, if you would, uh, make your motion for the record and go through your Memorandum so we can kind of follow you. The lawyers may respond if they want to.

MR. WELLFORD: The motion, Your Honor, is to open this trial to the press and the public. Now, I understand that this morning the Court ruled that the public and the press would be excluded. I understand that it was on the motion of the defendant. I do not know whether the Commonwealth took a position, uh, one way or the other, but I don't think that that is material.

We have appended to the [5] motion a bobtail Memorandum which cites some of the cases. Rather than to read the Memorandum to you, I'd like to make, uh, an argument based the points that we are advancing.

Now, the Supreme Court of the United States has said on a number of occasions that prior restraint on speech and publication is the most serious and least tolerated — least tolerable infringement on First Amendment rights. Now, that statement is from Nebraska Press Association against Stewart which was decided in 1975.

The Court continues: "Only the most exigent circumstances warrant the issuance of an Order curtailing the right of the press to publish. All other measures within the power of the Court to ensure a fair trial must be found to be unavailing

or deficient." [6] Now, I'll read that again. "All other measures within the power of the Court to ensure a fair trial must be found to be unavailing or deficient."

Nebraska Press involved a gag order issued at the conclusion of a preliminary hearing. This order, of course, excludes the press from the, uh, proceeding itself and does not purport to prohibit the press from publishing, but the case that I'm looking at now is the one cited in the Memorandum, Gannett Company against DePasquale, which also dealt with the exclusion of the press from a hearing, albeit a preliminary hearing.

As to the question of equating exclusion of the press with a gag order, which is unquestionably a prior restraint, the Court said this: There was a second infirmity which overshadows the right of the public to open [7] judicial proceedings. The exclusionary order entered here infringed petitioner's First Amendment rights in that it constituted a violation of the right of the press to publish free from unlawful govermanic [*sic*] interference. It is clear that a closed trial order restricts media access to information ordinarily made available to the general public. By denying access to the media a trial Judge can effectively prevent the publication of testimony or other information deemed prejudicial to the accused. It is this feature of the instance closed trial order that is attacked by petitioner as an infringement upon its First Amendment rights.

Logic compels the conclusion that where an exclusionary order is entered merely as a substitute for a gag order, which would otherwise place a direct [8] restraint on what the press can publish, such exclusionary order infringes upon protected First Amendment rights. An exclusionary order is merely a substitute for a direct prior restraint whereas here the sole purpose behind the order is to prevent the publication of what transpires in the Courtroom during a pretrial hearing.

The fact that such an order constitutes a novel form of censorship cannot insulate it or shield it from constitutional attack. In the area of indispensable First Amendment liberties the Supreme Court has been careful not to limit their protec-

tion to any particular way of abridging it — the citation there is Goschen against American Press Company; then it continues — since abridgement of such rights, even though unintended, may inevitably come from varied forms of governmental action.

[9] Where an exclusionary order is directed at the press to prevent the publication of material prejudicial to the defendant, First Amendment rights are abridged to the same degree as in the case of a gag order directing the press not to publish the asserted prejudicial information.

Now, the case that I am referring to, Gannett against DePasquale, points out that it is not just the right of the defendant that is interested in the proceedings in a Court and it states: The accused in a criminal prosecution has a constitutional right to a public trial, but the public trial guarantee does not inure to the benefit of the accused alone. The public has a vital interest in open judicial proceedings, especially criminal proceedings, to ensure that the integrity of the judicial process remains intact. Public trials serve [10] to instill a sense of public trust in our judicial process by preventing the abuse or abuses of secret tribunals as exemplified by the inquisition, Star Chamber, and lettre de cachet.

The searchlight of a trial which is open to the public serves as a restraint against the abuse of judicial power. A trial is a public event. Which — what transpires in the Courtroom is public property.

Then it continues: Precisely because the public at large has a vital stake in the concept of a public trial, the circumstances under which a trial Court may order closure have been closely circumscribed. Closure is permitted only in unusual circumstances or upon a clear showing that such an order is required to prevent a serious and imminent threat to the integrity of the trial.

[11] In the Nebraska Press case the Court found, and this is the United States Supreme Court, found that a reviewing Court must examine the evidence before the trial Judge when

the order was entered to determine the nature and extent of pretrial news coverage, whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity, how effectively a restraining order would operate to prevent the threatened danger. The reviewing Court should then consider whether the record supports the entry of a prior restraint on publication.

Now, that case, as I pointed out, entailed a gag order. In this case there has been no evidential finding so far as I know by the Court prior to the entry of this order. The public and the press have not been allowed to be heard. There has been no consideration [12] of other measures within the power of the Court to ensure a fair trial and I should add that there are cases which allude to sequestration of the jury or changes of venue as providing the appropriate alternative and superior alternatives than to prior restraints.

Now, for the foregoing reasons I submit to the Court that the trial should be open to the public.

Thank you.

THE COURT: Mr. Wellford, uh, the cases that you cited, uh, uh, and you gave me the benefit of some of them a few months ago when we had a question like this came — come up, uh, don't they all go to the point that the Court has to weigh, uh, in its own mind, uh, the different rights of the public or the rights of the defendant as against the rights of the public or the rights of the defendant as against the [13] rights of the press?

MR. WELLFORD: I think that is certainly a part of the evaluation, Your Honor. There's no question about the Sixth Amendment right of the defendant, but this particular action of the Court is the one infringement on the First Amendment that must be most severely tested, and Meer against Minnesota is the leading case in this area in which prior restraint was deemed to be bad.

I know of no case in which the Supreme Court of the United States has approved a closed trial. There are situations in

which, uh, hearings are held on suppression motions and the Court actually entertained whether or not the rights of the defendant might be adversely affected and whether or not, uh, there is some remedy that can offset the adverse effect. But I believe that the law is before [14] the Court that to enter an order such as you have entered today, it must, in fact, entertain alternatives which might protect the defendant's rights.

Now, not heard — having heard the motion, I do not know the injury which the Court seeks to prevent by the entry of this order. If it is the possibility that the jury, uh, may read the newspaper tomorrow and read evidence which it would otherwise not be entitled to see or hear in Court, then I submit to you that the answer constitutionally is that the jury be sequestered and that when you balance the First Amendment right against the inconvenience of the jury, constitutionally the First Amendment right overrides that inconvenience.

If the purported ill, the damage to the defendant's right, cannot be corrected in that fashion or in any other fashion, then the [15] Court's order arguably will stand, but I don't know of any case — not one case — before the United States Supreme Court in which a prior restraint has been upheld. The most startling case of all was the one involving the Pentagon papers in which they tried — the Pentagon and Justice Department tried to prevent publication by the New York Times of national secrets and the Supreme Court said you can't do it.

THE COURT: Thank you, sir.

Any of you other lawyers want to comment?

MR. NORWOOD: Uh, if Your Honor please, I kind of agree. You have to look out — look at the situation or question of whether or not the right of the press supersedes all other rights and I don't believe that the framers of the Constitution and the ones who drafted [16] the Amendment intended that the First Amendment should supersede and take priority over all other rights in the rest of the Amendments to the Federal Constitution.

Uh, Your Honor knows, and Mr. Wellford is not aware of this fact, this is the fourth time that we've had, uh — attempted to have a trial since the beginning and it is the third time that we've had difficulty, uh, with information, uh, between the jurors, and on two previous occasions Your Honor declared a mistrial and that was the reason why I wanted to avoid keep coming back up to the Court and keep having to try this case. I didn't want, uh, information to, uh, leak out and if the press writes something, you know that they don't always quote exactly verbatim what, uh, was said, unfortunately, and, uh, one of the reporters said well, can't you order the — the, uh, jurors [17] not to read the paper or not to look at television. Well, that's — you know, that's just like telling the jury to disregard that statement. There's no way that you can do it and I believe that the defendant's rights in this particular case and even in the case cited by Mr. Wellford in People versus Holder, it says in the next to the last paragraph on 9 — Page 935: While there may be instances where a defendant's right to a fair trial may dictate the exclusion of the public, in the light of the decision of the Court of Appeals, this is not such a case. Now, I haven't read the facts, but I submit that in our case this is such a case due to the problems that we've previously had in reference to this case and due to the problems that this is a small community, it's not like in a big city where you've got three hundred thousand [18] people, and I submit that I don't believe that the public's rights or the right of the press supersedes the — the, uh, defendant's right to a fair and impartial trial. I think that that right supersedes all other rights; that the Court has to guarantee or has to take such precautionary measures to ensure that the defendant will receive a fair and impartial trial, which has always been the law of our land, and I just think that the public and the press ought to be excluded.

THE COURT: Thank you, Mr. Norwood.

Before we hear from you, Mr. Bynum, I think that the record ought to show, uh, Mr. Norwood — I mean, Mr. Wellford, so that it will be in the record, uh, uh, Mr. Norwood, uh, made similar statements to that. Exactly what he said can be read if the record is ever typed up.

[19] This is the third time since it, uh, came back that we've tried to give Mr. Stevenson a trial, but one of the other points that, uh, uh, we take into consideration in this particular Courtroom is layout of the Courtroom. I think that, uh, having people in the Courtroom is distracting to the jury. Now, we have to have certain people in here and maybe that's not a very good reason. Uh, when we get into our new Court Building, uh, people can sit in the audience so the jury can't see them. Uh, the rule of the Court may be different under those circumstances, but I think that the — in order to make the record, uh, uh, some of the things that went through my mind.

I did not have a — a hearing to which, uh, you were invited, Mr. Wellford, uh, before I made the ruling. Uh, on the defendant's motion and a short [20] statement by him, and if I recall correctly, the Commonwealth didn't comment one way or the other. He may not want to comment now. Uh, I felt under the circumstances that, uh, my ruling was proper.

Mr. Bynum, do you want to comment on anything that I may have missed?

MR. BYNUM: No, sir, Your Honor.

THE COURT: Uh, I think it would be very helpful, Mr. Wellford, if, uh, uh, Courts in my situation could have some guiding, uh, lights to go by. I'm inclined to agree with Mr. Norwood that, uh, if I feel that the — the, uh, rights of the defendant are infringed in any way then, uh, he makes the motion to do something and, uh, it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion.

[21] Now, I'll let you say something else if you want to, but, uh, I'm just trying to make a record for you so you can do something with this if you want to.

MR. WELLFORD: I have an order which I have drawn, Your Honor, denying my motion —

THE COURT: All right.

MR. WELLFORD: — which I will tender to the Court.

THE COURT: Yes, sir.

MR. WELLFORD: Before handing it up, I would like to point out that I am not out of sympathy with what Mr. Norwood said. I view with absolute amazement trials such as the Manson trial in California where jurors are sequestered for months on end and view with amazement the fact that some of these defendants keep coming back. I think we just finished with, uh, Leslie Van Houten for the third time, but I would point out to the Court that the [22] public was there, and I've been practicing law for twenty years and what Mr. Norwood has said about the rights of the defendant has been true since before I undertook the practice of law and remains true. Certainly if the defendant does not want the public to know or information to be published, then he can ask that the, uh, public be excluded but it very seldom is.

I can represent to the Court that the motion made by Mr. Norwood was made in Richmond within the past few weeks before Judge Wilkinson and was denied. I don't know whether the Court knows of any case in which the press has been excluded from a criminal trial or the public. I, for one, know of only two.

THE COURT: Yes, well, this Court excluded the public in the last capital murder trial we had. We did not exclude the press, if I [23] recall.

MR. WELLFORD: I stand corrected.

THE COURT: But the press was present.

All right, hand that up, Mr. Baughan.

NOTE: Order is now being handed to the Court.

THE COURT: I've marked the original filed, Mr. Wellford, so that is in — before the Court.

MR. WELLFORD: Thank you, Your Honor.

THE COURT: Mr. Wellford, I have another problem that, uh, the Clerk and I had one time before. We had a motion to, uh, uh, expunge the record, which is allowed under the new statute, and by the time we got through expunging the record, we had created more record than we had when we started.

[24] Now, uh, your motion here today, uh, I — I cannot prohibit you from immediately going upstairs. Now, whether I should prohibit you from discussing it with your clients, Richmond Newspapers, Timothy Wheeler and Kevin McCarthy, I have a problem with. Uh, I don't know whether — can Mr. Norwood or Mr. Bynum advise me, uh, should I stick my foot really far in it and put a gag rule on Mr. Wellford at this point? Now, his clients have petitioned into this suit.

MR. NORWOOD: Well, Judge, I don't —

MR. BYNUM: From a practical standpoint, Your Honor, I think, uh, if the newspapers do print something, I anticipate being through tomorrow with this case and the jury — no, they wouldn't necessarily do that because you've got, uh, the Dispatch.

[25] MR. NORWOOD: They can read the morning's paper. Uh, Judge, I don't believe that, uh — although I have seen instances where the Court has ordered the attorney not to discuss or relay the information to the client when it would be detrimental to some other's interest to do so, but I'm reluctant to ask the Court to order Mr. Wellford not to discuss this matter —

THE COURT: Yes, sir.

MR. NORWOOD: — with his client, but, uh, I believe it would be infringing on Mr. Wellford's right as attorney and his client.

THE COURT: Yes, sir, I'm inclined to agree with you.

MR. WELLFORD: I think, Your Honor, that if they don't get in, they're going to know —

THE COURT: Yes.

MR. WELLFORD: — the actions of the Court whether I discuss it with them or not. I don't propose [26] to go into that. They knew why I was here, they've seen the motion —

THE COURT: Right.

MR. WELLFORD: — and, uh, I can tell them you denied the motion.

THE COURT: And if you, uh, uh, need anything from the Court, Mr. Wellford, uh, a stipulation or something in writing or something of that nature, uh, the Court will be glad to cooperate with you.

MR. WELLFORD: We have no intentions of running off anywhere tonight or tomorrow. I think that, uh, normally the procedure is in these cases a Writ of Mandamus and I believe the law is if there's a continuing interest that's not mooted by the conclusion of the trial —

THE COURT: Yes, sir.

MR. WELLFORD: — and so I would propose to allow the trial to continue in this and follow normal [27] processes. I hope the Court is not offended.

THE COURT: No, sir.

MR. WELLFORD: We'd like to —

THE COURT: I'd like to be helped and we'd all like to be helped.

MR. WELLFORD: Thank you.

THE COURT: I thank all of you gentlemen and we'll start again tomorrow morning at ten o'clock with the press and public excluded.

MR. NORWOOD: Thank you, sir.

Hearing concluded at 5:20 o'clock P.M.

Appendix F.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA

v.

JOHN PAUL STEVENSON,
Defendant.

Petition to Intervene

Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy, both of whom are reporters and employed by Richmond Newspapers, Inc., petition the Court to permit their intervention in the captioned matter, *nunc pro tunc* September 11, 1978, for the purpose of asserting defenses to the Court's order of that day closing the trial of the captioned matter to the public and the press. Petitioners tender the attached Memorandum of Law in support of their petition.

RICHMOND NEWSPAPERS, INC.
TIMOTHY B. WHEELER
KEVIN McCARTHY
By Counsel

Christian, Barton, Epps, Brent
& Chappell
1200 Mutual Building
Richmond, Virginia 23219

ALEXANDER WELLFORD,
Of Counsel
Filed September 27, 1978.

Appendix G.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA

v.

JOHN PAUL STEVENSON,
Defendant.

Order

This day came Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy, by counsel, and filed their petition with the Court seeking leave to intervene *nunc pro tunc* September 11, 1978, in the captioned matter, for the purpose of asserting defenses to the Court's order closing the trial of the above captioned matter to the public and the press.

And having reviewed a memorandum tendered with the petition, and deeming it proper to do so, the Court grants the said petition.

Enter: September 27, 1978 RICHARD H.C. TAYLOR,
Judge

We ask for this:

ALEXANDER WELLFORD
Of Counsel

Appendix H.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA

v.

JOHN PAUL STEVENSON,
Defendant.

Motion

Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy, both of whom are reporters and employed by Richmond Newspapers, Inc., move the Court to vacate its order closing the captioned criminal trial to the public and the press, and to permit the public and the press to have access to the courtroom during the trial. Movants tender the attached Memorandum of Law in support of their motion.

RICHMOND NEWSPAPERS, INC.
TIMOTHY B. WHEELER
KEVIN McCARTHY
By Counsel

Christian, Barton, Epps, Brent & Chappell
1200 Mutual Building
Richmond, Virginia 23219

ALEXANDER WELLFORD,
Of Counsel

Filed September 11, 1978.

Appendix I.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA

v.

JOHN PAUL STEVENSON,
Defendant.

Order

This day came Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy, by counsel, and filed their motion with the Court seeking vacation of the Court's order closing this trial to the public and the press, and seeking access to the courtroom during said trial.

And having reviewed a memorandum tendered with the motion, and deeming it proper so to do, the Court denies the said motion.

Enter: September 11, 1978 RICHARD H.C. TAYLOR,
Judge

Seen and objected to
ALEXANDER WELLFORD
Of Counsel

Appendix J.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA

v.

JOHN PAUL STEVENSON,
Defendant.

Notice of Appeal

Intervenors Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy, by counsel, note their appeal from the final orders and judgment excluding the public and the press from the courtroom during the trial of the captioned matter, denying their motion seeking vacation of the Court's order closing the trial, and denying them access to the courtroom during the trial. A transcript of the relevant hearings has been filed this day.

RICHMOND NEWSPAPERS, INC.
TIMOTHY B. WHEELER
KEVIN McCARTHY
By Counsel

Christian, Barton, Epps, Brent
& Chappell
1200 Mutual Building
Richmond, Virginia 23219

ALEXANDER WELLFORD,
Of Counsel

Filed September 27, 1978.

Appendix K.

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

In re Richmond Newspapers, Inc.
Timothy B. Wheeler, and
Kevin McCarthy,
Petitioners.

Petition for Writ of Mandamus

The Petitioners, Richmond Newspapers, Inc., and two of its reporters and employees, Timothy B. Wheeler and Kevin McCarthy, respectfully petition this Court to issue a writ of mandamus to compel the Hon. Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, to grant them access to the criminal proceedings in *Commonwealth* v. *John Paul Stevenson*, and to all future criminal proceedings which he may order closed in violation of the Constitution.

Stevenson's trial was conducted on September 11 and 12, 1978. At the beginning of the trial, his attorney moved to exclude the public and the press from the courtroom during the trial. Judge Taylor granted the motion. At a hearing conducted on the afternoon of September 11, Judge Taylor denied the Petitioners' motion to reopen the courtroom, despite the fact that its closure denied the public and the press their constitutional right to witness the trial proceedings. Stevenson's trial was concluded on September 12, 1978; the public and the press were admitted to no part of the trial.

In support of this petition, the Petitioners submit a memorandum of law detailing more fully the facts surrounding Judge Taylor's closure of Stevenson's trial and the legal author-

ities which render that closure unlawful, as well as an appendix containing the relevant trial orders, a transcript of the hearing on the Petitioners' motion to reopen the courtroom, and four newspaper articles which the Petitioners certify to have appeared in newspapers published by Richmond Newspapers, Inc.

In the opinion of the Petitioners, the foregoing is sufficient for the proper disposition of the petition, and the taking of evidence is not necessary.

Richmond Newspaper, Inc.
By J. STEWART BRYAN, III
Publisher

TIMOTHY B. WHEELER

KEVIN McCARTHY

STATE OF VIRGINIA,
CITY OF RICHMOND, To-wit:

I, Margaret V. Lechner, a Notary Public in and for the City and State aforesaid, do hereby certify that J. Stewart Bryan, III, known to me to be the Publisher of Richmond Newspapers, Inc., whose name is signed to the foregoing Petition for Writ of Mandamus, personally appeared before me and made oath that the statements contained therein are true to the best of his knowledge, information and belief.

Given under my hand this 7th day of November, 1978.
My commission expires: September 1, 1979

MARGARET V. LECHNER
Notary Public

STATE OF VIRGINIA
CITY OF RICHMOND, To-wit:

I, Barbara R. Loony, a Notary Public in and for the City and State aforesaid, do hereby certify that Timothy B. Wheeler and Kevin McCarthy, whose names are signed to the foregoing Petition for Writ of Mandamus, personally appeared before me and made oath that the statements contained therein are true to the best of their knowledge, information, and belief.

Given under my hand this 3rd day of November, 1978.
My commission expires: May 21, 1979

BARBARA R. LOONY
Notary Public

Appendix L.

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

In re Richmond Newspapers, Inc.
Timothy B. Wheeler, and
Kevin McCarthy,
Petitioners.

Petition for Writ of Prohibition

The Petitioners, Richmond Newspapers, Inc., and two of its reporters and employees, Timothy B. Wheeler and Kevin McCarthy, respectfully petition this Court to issue a writ of prohibition to prohibit the Hon. Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, from denying them access to the criminal proceedings in *Commonwealth* v. *John Paul Stevenson*, and to all future criminal proceedings which he may order closed in violation of the Constitution.

Stevenson's trial was conducted on September 11 and 12, 1978. At the beginning of the trial, his attorney moved to exclude the public and the press from the courtroom during the trial. Judge Taylor granted the motion, despite the fact that he had no legal authority to order a courtroom closed without first giving interested members of the public and the press notice of the proposed closure and an opportunity for a hearing, and without first determining that no alternative means existed to protect Stevenson's right to a fair trial. The public and the press were admitted to no part of Stevenson's trial.

In support of this petition, the Petitioners submit a memorandum of law detailing more fully the facts surrounding Judge Taylor's closure of Stevenson's trial and the legal author-

ties which render that closure unlawful, as well as an appendix containing the relevant trial orders, a transcript of the hearing on the Petitioners' motion to reopen the courtroom, and four newspaper articles which the Petitioners certify to have appeared in newspapers published by Richmond Newspapers, Inc.

In the opinion of the Petitioners, the foregoing is sufficient for the proper disposition of the petition, and the taking of evidence is not necessary.

Richmond Newspapers, Inc.
By J. STEWART BRYAN, III
Publisher

TIMOTHY B. WHEELER

KEVIN McCARTHY

STATE OF VIRGINIA,
CITY OF RICHMOND, To-wit:

I, Margaret V. Lechner, a Notary Public in and for the City and State aforesaid, do hereby certify that J. Stewart Bryan, III, known to me to be the Publisher of Richmond Newspapers, Inc., whose name is signed to the foregoing Petition for Writ of Prohibition, personally appeared before me and made oath that the statements contained therein are true to the best of his knowledge, information and belief.

Given under my hand this 7th day of November, 1978.

My commission expires: September 1, 1979

MARGARET V. LECHNER
Notary Public

STATE OF VIRGINIA
CITY OF RICHMOND, To-wit:

I, Barbara R. Loony, a Notary Public in and for the City and State aforesaid, do hereby certify that Timothy B. Wheeler and Kevin McCarthy, whose names are signed to the foregoing Petition for Writ of Prohibition, personally appeared before me and made oath that the statements contained therein are true to the best of their knowledge, information, and belief.

Given under my hand this 3rd day of November, 1978.
My commission expires: May 21, 1979

BARBARA R. LOONY
Notary Public

ACCEPTANCE OF SERVICE

I, Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, accept service and acknowledge receipt on this 8th day of November, 1978, of petitions to the Supreme Court of Virginia for writs of mandamus and prohibition to be filed by Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy, copies of which are attached hereto, together with a copy of a petition for appeal and memorandum in support of said petitions for writs of mandamus and prohibition.

RICHARD H. C. TAYLOR

Appendix M.

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RICHMOND NEWSPAPERS, INC.,
TIMOTHY B. WHEELER, AND
KEVIN McCARTHY,
PETITIONERS.

v. No. 781600

RICHARD H.C. TAYLOR
RESPONDENT.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Richmond Newspapers, Inc., and the other petitioners named above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia, entered on July 9, 1979, dismissing petitioners' petition for a writ of prohibition to enjoin respondent from denying petitioners access to his courtroom in the circumstances set forth in their petition.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ALEXANDER WELLFORD
Counsel for Appellants.

Andrew J. Brent
Alexander Wellford
Leslie W. Mullins
Christian, Barton, Epps,
Brent & Chappell
1200 Mutual Building
Richmond, Virginia 23219

Laurence H. Tribe
Griswold Hall 307
Harvard Law School
Cambridge, Massachusetts 02138

Counsel for Petitioners.

DATED: August 13, 1979.

CERTIFICATE OF SERVICE

I, Alexander Wellford, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by delivering same to the Clerk of the Supreme Court of Virginia, 1101 East Broad Street, Richmond, Virginia 23219; to J. Marshall Coleman, Attorney General of Virginia, 1105 East Broad Street, Richmond, Virginia 23219; and to Patrick R. Bynum, Jr., Commonwealth's Attorney for Hanover County, 105 North England Street, Ashland, Virginia 23005, attorneys for appellee. All parties required to be served have been served.

ALEXANDER WELLFORD,
Counsel for Appellants.

DATED: August 13, 1979.

IN THE SUPREME COURT OF VIRGINIA AT RICHMOND

RICHMOND NEWSPAPERS, INC.,
TIMOTHY B. WHEELER, AND
KEVIN McCARTHY,
PETITIONERS,

v. No. 781599

RICHARD H.C. TAYLOR,
RESPONDENT.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Richmond Newspapers, Inc., and the other petitioners named above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia, entered on July 9, 1979, dismissing petitioners' petition for a writ of mandamus to enjoin respondent to grant petitioners access to his courtroom in the circumstances set forth in their petition.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ALEXANDER WELLFORD
Counsel for Appellants.

Andrew J. Brent
Alexander Wellford
Leslie W. Mullins
Christian, Barton, Epps,
Brent & Chappell
1200 Mutual Building
Richmond, Virginia 23219

Laurence H. Tribe
Griswold Hall 307
Harvard Law School
Cambridge, Massachusetts 02138

Counsel for Petitioners.

DATED: August 13, 1979.

CERTIFICATE OF SERVICE

I, Alexander Wellford, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by delivering same to the Clerk of the Supreme Court of Virginia, 1101 East Broad Street, Richmond, Virginia 23219; to J. Marshall Coleman, Attorney General of Virginia, 1105 East Broad Street, Richmond, Virginia 23219; and to Patrick R. Bynum, Jr., Commonwealth's Attorney for Hanover County, 105 North England Street, Ashland, Virginia 23005, attorneys for appellee. All parties required to be served have been served.

ALLEXANDER WELLFORD,
Counsel for Appellants.

DATED: August 13, 1979.

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RICHMOND NEWSPAPERS, INC.,
TIMOTHY B. WHEELER, AND
KEVIN McCARTHY,
APPELLANTS,

v. No. 781598

COMMONWEALTH OF VIRGINIA,
APPELLEE.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Richmond Newspapers, Inc., and the other appellants named above hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia denying appellants' petition for appeal from a trial court's order barring the press and the public from a two-day criminal trial, entered on July 9, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ALEXANDER WELLFORD
Counsel for Appellants.

Andrew J. Brent
Alexander Wellford
Leslie W. Mullins
Christian, Barton, Epps,
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DATED: August 13, 1979.

CERTIFICATE OF SERVICE

I, Alexander Wellford, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by delivering same to the Clerk of the Supreme Court of Virginia, 1101 East Broad Street, Richmond, Virginia 23219; to J. Marshall Coleman, Attorney General of Virginia, 1105 East Broad Street, Richmond, Virginia 23219; and to Patrick R. Bynum, Jr., Commonwealth's Attorney for Hanover County, 105 North England Street, Ashland,

Virginia 23005, attorneys for appellee. All parties required to be served have been served.

ALEXANDER WELLFORD,
Counsel for Appellants.

DATED: August 13, 1979.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

RICHMOND NEWSPAPERS, INC.,
TIMOTHY B. WHEELER, AND
KEVIN McCARTHY,
PETITIONERS,

v. No. 781600

RICHARD H.C. TAYLOR,
RESPONDENT.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Richmond Newspapers, Inc., and the other petitioners named above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia, entered on July 9, 1979, dismissing petitioners' petition for a writ of prohibition to enjoin respondent from denying petitioners access to his courtroom in the circumstances set forth in their petition.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Counsel for Petitioners.

DATED: August 13, 1979.

CERTIFICATE OF SERVICE

I, Alexander Wellford, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by delivering same to the Clerk of the Circuit Court of the County of Hanover, Hanover County, Virginia 23069; to J. Marshall Coleman, Attorney General of Virginia, 1105 East Broad Street, Richmond, Virginia 23219; and to Patrick R. Bynum, Jr., Commonwealth's Attorney for Hanover County, 105 North England Street, Ashland, Virginia 23005, attorneys for appellee. All parties required to be served have been served.

ALEXANDER WELLFORD,
Counsel for Appellants.

DATED: August 13, 1979.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

RICHMOND NEWSPAPERS, INC.,
TIMOTHY B. WHEELER, AND
KEVIN McCARTHY,
PETITIONERS.

v. No. 781599

RICHARD H.C. TAYLOR,
RESPONDENT.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Richmond Newspapers, Inc., and the other petitioners named above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia, entered on July 9, 1979, dismissing petitioners' petition for a writ of mandamus to enjoin respondent to grant petitioners access to his courtroom in the circumstances set forth in their petition.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Counsel for Petitioners.

DATED: August 13, 1979.

CERTIFICATE OF SERVICE

I, Alexander Wellford, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by delivering same to the Clerk of the Circuit Court of the County of Hanover, Hanover County, Virginia 23069; to J. Marshall Coleman, Attorney General of Virginia, 1105 East Broad Street, Richmond, Virginia 23219; and to Patrick R. Bynum, Jr., Commonwealth's Attorney for Hanover County, 105 North England Street, Ashland, Virginia 23005, attorneys for appellee. All parties required to be served have been served.

ALEXANDER WELLFORD,
Counsel for Appellants.

DATED: August 13, 1979.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

RICHMOND NEWSPAPERS, INC.,
TIMOTHY B. WHEELER, AND
KEVIN McCARTHY,
APPELLANTS,

v. No. 781598

CASE NO. 68-A-77

COMMONWEALTH OF VIRGINIA,
APPELLEE.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Richmond Newspapers, Inc., and the other appellants named above hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia denying appellants' petition for appeal from a trial court's order barring the press and the public from a two-day criminal trial, entered on July 9, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Counsel for Appellants.

DATED: August 13, 1979.

CERTIFICATE OF SERVICE

I, Alexander Wellford, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by delivering same to the Clerk of the Circuit Court of the County of Hanover, Hanover County, Virginia 23069; to J. Marshall Coleman, Attorney General of Virginia, 1105 East Broad Street, Richmond, Virginia 23219; and to Patrick R. Bynum, Jr., Commonwealth's Attorney for Hanover County, 105 North England Street, Ashland, Virginia 23005, attorneys for appellee. All parties required to be served have been served.

ALEXANDER WELLFORD,
Counsel for Appellants.

DATED: August 13, 1979.

Appendix N.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HANOVER

September 12, 1978

Case No. 68-A-77

Commonwealth of Virginia
Vs. Upon an Indictment, to-wit: Murder
John Paul Stevenson

This day came the Attorney for the Commonwealth and John Paul Stevenson, who stands indicted for a felony, to-wit: Murder, as charged in the Indictment, appeared according to the condition of his recognizance, and came also C. Willard Norwood, his attorney, and also came the jury.

Whereupon, in the absence of the jury, the defendant by counsel made a Motion that a mis-trial be declared, which motion was taken under advisement.

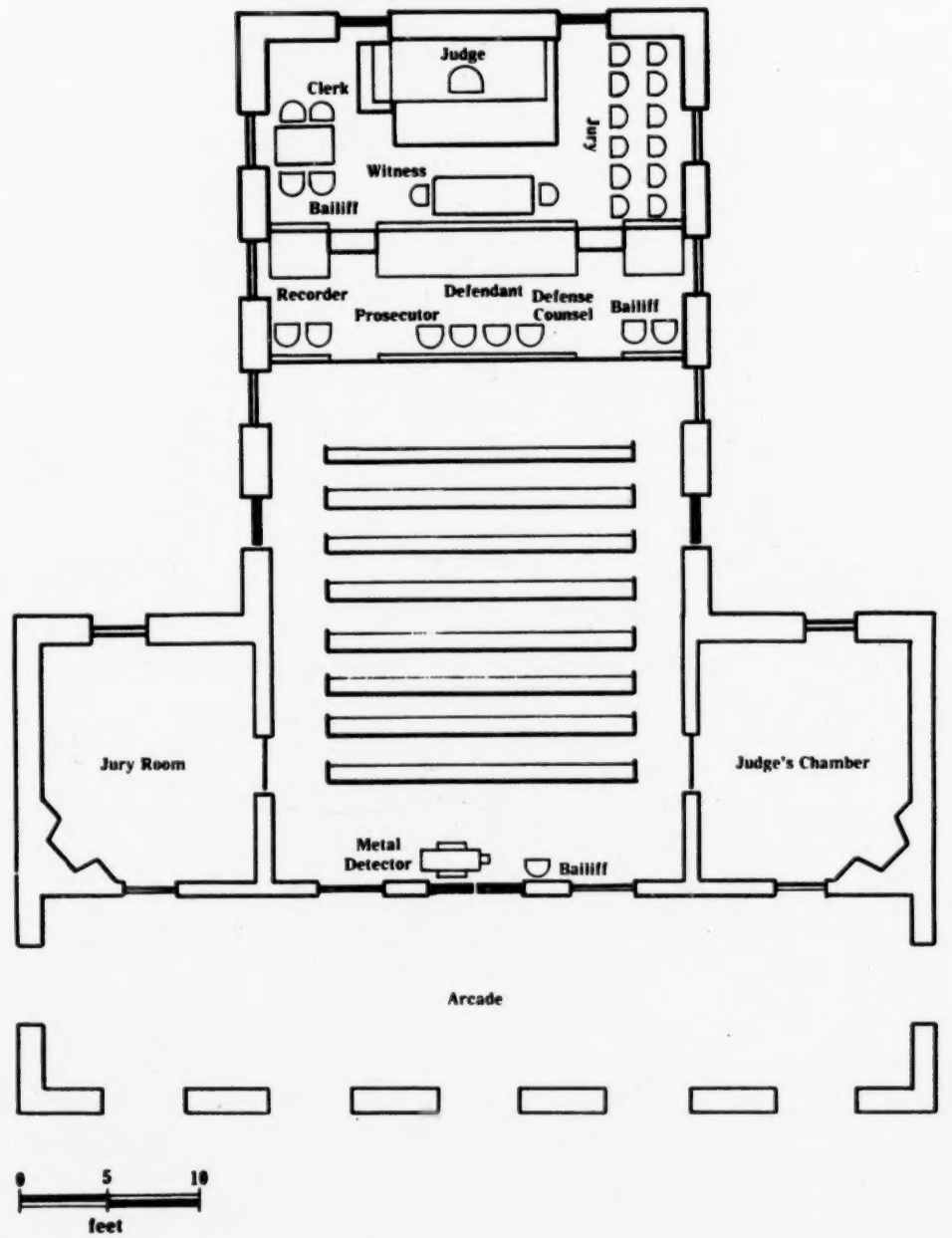
At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which Motion was sustained by the Court.

And the jury having been excused, the Court doth find the accused NOT GUILTY of Murder, as charged in the Indictment, and he was allowed to depart.

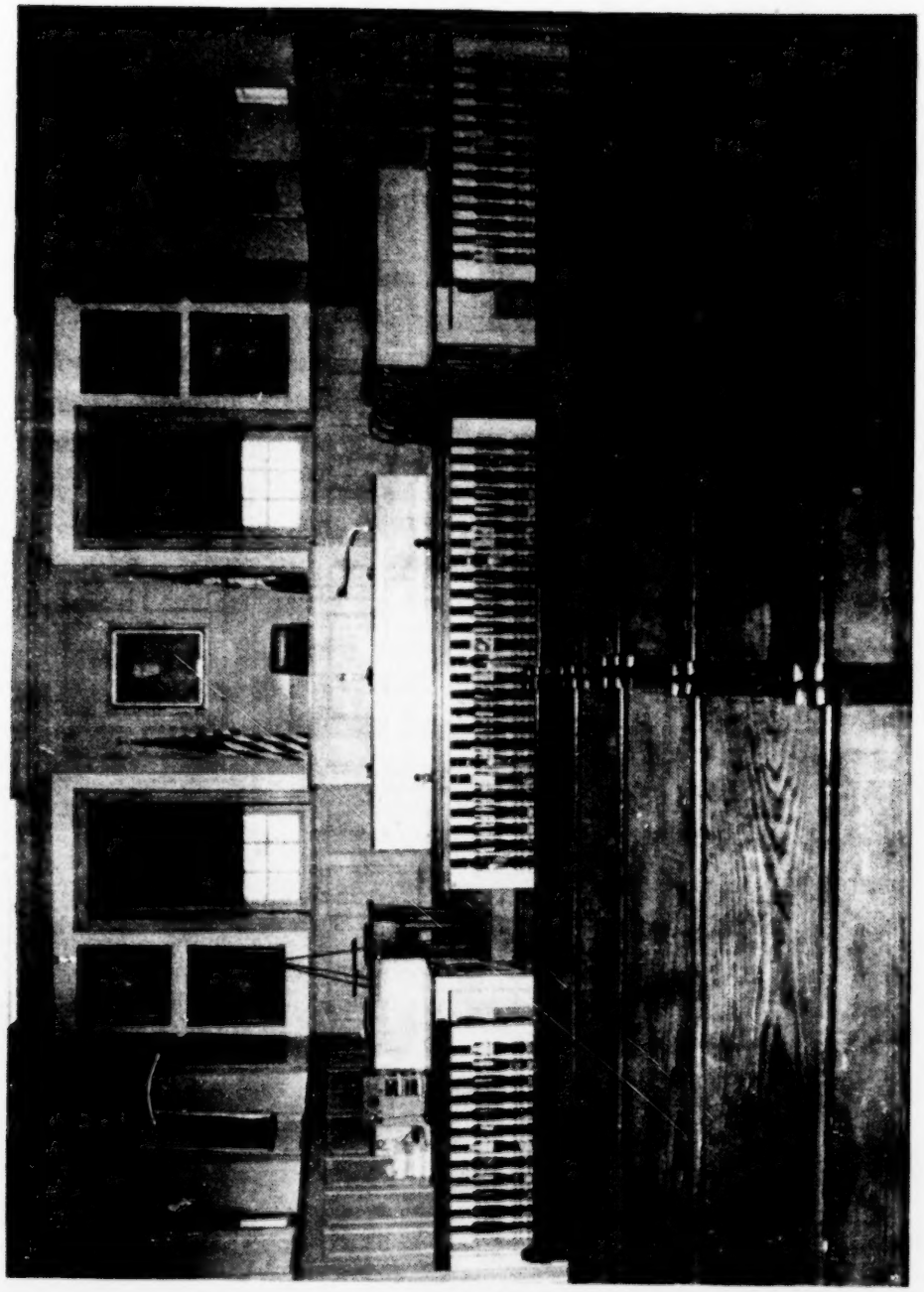
RICHARD H.C. TAYLOR
Judge

Appendix O.

Hanover County Courthouse
Hanover, Virginia



Appendix P.



Supreme Court, U. S.
FILED
SEP 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

Appellants,

v.

RICHARD H.C. TAYLOR,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
THE ASSOCIATED PRESS MANAGING EDITORS
THE NATIONAL ASSOCIATION OF BROADCASTERS
THE NATIONAL NEWSPAPER ASSOCIATION
THE NATIONAL PRESS CLUB
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI
THE VIRGINIA PRESS ASSOCIATION

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"Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press," American Bar Association Legal Advisory Committee on Fair Trial and Free Press, (1976) 29

Court Watch Study . . . . . *passim*, Appendix to Brief

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IN THE

Supreme Court of the United States

October Term 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v.

Appellants,

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v.

Appellants,

RICHARD H.C. TAYLOR,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

INTRODUCTION

This case is of the greatest interest and importance to the public and the press because it poses the issue of whether this Court – having sanctioned a secret court system for many pretrial hearings – is now prepared to extend this censorship principle by authorizing secret trial proceedings.

It is the position of these Amici that there is virtually no instance – and certainly not in this case – where the public and the press may be excluded from a criminal trial except upon a showing that such exclusion is essential in

order to avoid a direct, immediate and irreparable injury to the administration of justice.

Furthermore, this case presents the Court with an opportunity it should seize upon to reverse – or substantially modify – its ruling in *Gannett Co., Inc. v. DePasquale*, 99 S.Ct. 2898 (1979).

The *Gannett* decision has, within six weeks, produced flagrant misuse and misinterpretation of the type which this Court could never have envisioned. The instant case is an example of that abuse, because the Virginia Supreme Court cited the *Gannett* decision to justify a complete closing of a criminal trial.

The frequent use of *Gannett* and the scope to which it is being extended are not limited to pretrial confession hearings, but extend over the entire spectrum of the criminal justice process. Efforts have been made, some of them successfully, to close pre-indictment, trial, conviction and post-conviction proceedings.

The immediate impact of *Gannett* is quite clear. It is already encouraging widespread secrecy in the courts and undermining popular confidence in the integrity of our criminal justice system.

We respectfully submit that this Court should note probable jurisdiction in this case and halt the trend toward censorship before any further irreparable damage is done to the First, Sixth and Fourteenth Amendment rights of the press and the public to know how our courts are operating.

JURISDICTIONAL STATEMENT

This Brief Amici Curiae in support of Appellants is filed with the consent of Appellants and Appellees.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press. As this Court knows, this Amicus has appeared in virtually every recent case before the Court involving restrictions on the ability of the press to report judicial proceedings.

The Associated Press Managing Editors is an organization of 600 editors of newspapers affiliated with the Associated Press, which is the largest news-gathering organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The National Association of Broadcasters (NAB) is a non-profit incorporated association of radio and television broadcast stations and networks. As of September 1, 1979, NAB's membership included 2587 AM radio stations, 2030 FM radio stations, 583 television stations, and all nationwide commercial broadcast networks. The object of NAB, according to its Bylaws:

> [S]hall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and

> unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

Among NAB's primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a national organization of 5,500 newspapers with members in all 50 states. Its purpose is to preserve the constitutional guarantee of freedom of the press.

The National Press Club, the largest press club in the United States, is a broadly based journalistic organization. More than 1,200 active journalists, in all regions of the country, are members of the National Press Club.

The Radio-Television News Directors Association (RTNDA) is a non-profit professional organization of journalists. It includes approximately 1,500 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast by the national networks and by local radio and television stations throughout the nation.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization, of nearly 35,000 members representing every branch of print and broadcast journalism. It includes all ranks from student and beginning reporter to editor, publisher and broadcast executive. The Society works to preserve the public's right to know, to require that the public's business be conducted in public and to keep governmental records open to public inspection.

The Virginia Press Association is a non-profit corporation registered in the Commonwealth of Virginia representing a majority of the daily and weekly newspapers published in Virginia. The purpose of the Association is to expedite programs and activities furthering the editorial excellence of these newspapers and their service to the citizens of Virginia.

QUESTIONS PRESENTED

1. Should this Court reverse – or at least substantially modify – its decision in *Gannett v. DePasquale* on the grounds that it was wrongfully decided or that it is being so frequently abused that it must be significantly limited or qualified?

2. Do the First, Sixth and Fourteenth Amendments presumptively establish criminal trials as public forums open to members of the public and the press, or is the right to a public trial an exclusively personal right of the defendant?

3. If a criminal trial is a presumptively "public forum," can a prior restraint be imposed on the carrying out of that trial except upon a showing:

> (A) that there will be a direct and immediate injury to the fair administration of justice;
>
> (B) that the injury is irreparable because no trial or appellate court can repair the damage by any means, including but not limited to a directed verdict, dismissal, mistrial, or reversal of conviction; and,
>
> (C) there are no other reasonable alternatives to prevent this injury.

STATEMENT OF THE CASE

The Amici adopt the statement of facts as set forth by Appellants and summarize these facts as follows:

John Paul Stevenson, a Baltimore resident, was indicted for murder in March 1976 by a Grand Jury in Hanover County, Virginia, on charges of fatally stabbing the manager of the Holly Court Motel. The defendant was convicted in July 1976. That conviction was reversed in October 1977 by the Virginia Supreme Court because of the improper admission of evidence. 218 Va. 462, 237 S.E.2d 779 (1977).

Stevenson went to trial again in May 1978. On May 30 the Hanover County Circuit Court declared a mistrial because insufficient jurors were available. *Virginia v. Stevenson*, No. 68-A-77, issued May 30, 1978; see *Richmond News Leader*, May 31, 1978, p. 59, col. 1.

In June 1978, Stevenson's third trial began. On June 6 a mistrial was again declared. While no reason was publicly given, the *Richmond News Leader* quoted one source as saying, "***the mistrial declaration involved a prospective juror who had read about Stevenson's trial in a newspaper and had proceeded to tell other prospective jurors about the case before the trial began yesterday." *Richmond News Leader*, June 7, 1978, p. B-6, col. 1.

The fourth trial began in September 1978, and on September 11, the defense attorney moved to exclude the public and the press from the courtroom because, as the attorney explained, "* * * I don't want any information being shuffled back and forth when we have a recess as to what – who testified to what." The judge granted the motion. Appellants' Appendix D at 7a.

Later that day, Appellant Richmond Newspapers, Inc., publisher of *The Richmond News Leader* and *The Richmond Times-Dispatch*, and two of its reporters, Appellants Timothy B. Wheeler and Kevin McCarthy, made an appearance by counsel before the Hanover Circuit Court and objected to the closure order.

The Richmond Newspapers' counsel pressed the right of the public and press under the First and Sixth Amendments (as incorporated in the Fourteenth Amendment) to attend criminal trials, noting, "* * * where an exclusionary order is entered merely as a substitute for a gag order, which would otherwise place a direct restraint on what the press can publish, such exclusionary order * * * is merely a substitute for a direct prior restraint * * *." Appellants' Appendix E at 11a.

The defense attorney made abundantly clear that the sole reason for his motion was a fear of press reports. He said: "I didn't want * * * information to * * * leak out and if the press writes something, you know that they don't always quote exactly verbatim * * * and * * * one of the reporters said well, can't you order the * * * jurors not to read the paper or not to look at television. Well, that's – you know, that's just like telling the jury to disregard that statement. There's no way that you can do it * * *." *Id.* at 15a.

The hearing ended when the court said, "* * * we'll start again tomorrow morning at ten o'clock with the press and public excluded." *Id.* at 19a.

The judge specifically cited his power to close a trial under a state statute which provides in part that "In the trial of all criminal cases, * * * the court may, in its discretion, exclude from the trial any persons whose presence

would impair the conduct of a fair trail, provided that the right of the accused to a public trial shall not be violated." Va. Code Sec. 19.2-266; Appellants' Jurisdictional Statement at 6.

While it is not clear from the record precisely what the judge's reasoning was, he did appear to be sympathetic to the defense's argument that press stories could prejudice the jury. But he also noted that one of the factors was that "* * * having people in the Courtroom is distracting to the jury. * * * [W]hen we get into our new Court Building, * * * people can sit in the audience so the jury can't see them. * * *" Appellants' Appendix E at 16a.

On November 8, 1978, Richmond Newspapers and its reporters filed for a Writ of Mandamus in the Virginia Supreme Court. Appellants' Appendix K at 25a.

On July 9, 1979, the Virginia Supreme Court dismissed the petition, citing as support for its conclusion this Court's decision in *Gannett*. Appellants' Appendix A at 1a.

SUMMARY OF THE ARGUMENT

This Court's ruling in *Gannett* has been widely misunderstood, has created great confusion in the legal community, and needs to be reexamined. Moreover, it was based upon a series of factual assumptions which, in six short weeks, have proven to be inaccurate. See *Court Watch Study*, Appendix hereto. The already demonstrated misuse and abuse of *Gannett* should lead this Court to reverse that decision or at a minimum to modify it with specificity and particularity.

In such reexamination, the Court should consider that the right of the public and the press to attend, observe and comment upon the public carrying out of criminal justice is one of the most ancient and strongly vested rights granted under the Constitution of the United States.

Under a number of this Court's prior cases, the exclusion of the people and their surrogates, the media, from public forums, political events and performances, which they have a vested constitutional right to attend, constitutes a "prior restraint," and this right is separate and apart from the right of the criminal defendant to demand a public forum for his trial.

Therefore, any prior restraint on the public "performance" of a criminal trial can only be accomplished under the classic test enunciated in *Near v. Minnesota*, 283 U.S. 697 (1931), or more recently by three Justices of this Court in *New York Times Co. v. United States*, 403 U.S. 713, 723, 726, 730 (1971) (Douglas, Brennan & Stewart, JJ., concurring). This test requires a direct, immediate and irreparable injury without any reasonable alternative solution, and further that any effort to impose a prior restraint must be accompanied by notice and an opportunity to be heard.

ARGUMENT

I

THE *GANNETT* RULING HAS BEEN WIDELY MISUNDERSTOOD AND MUST BE REEXAMINED BY THE COURT IN THE FACE OF A RISING TIDE OF CLOSED CRIMINAL PROCEEDINGS.

This Court's ruling in *Gannett* has caused such widespread confusion in the legal community that it must be rectified before our traditional system of open criminal proceedings is entirely transformed into a chain of secret hearings, cut off from the very public that should act as its overseer.

We respectfully submit that this confusion cannot entirely be attributed either to a too facile reading of the various opinions or to inaccurate media reporting of what the Court held. Unfortunately, the *Gannett* opinions, read together, are legitimately subject to several interpretations.

One view is that because of the detailed discussion of trials in Parts IV and V(A) of Mr. Justice Stewart's opinion, the Court intended to cover in its conclusions the entire judicial process, even though a pretrial hearing was the precise factual context before the Court. However, such a reading would produce a result which would appear to have garnered the votes of only Justices Stewart, Powell, Rehnquist and Stevens, because the Chief Justice explicitly limited his conclusions to pretrial hearings.

A second view is that the discussion of trials was *dicta*, and that the Court intended its conclusions allowing closures to apply only to pretrial hearings. However, only the Chief Justice and Justices Stewart, Powell and Stevens appear to have subscribed to this view, because Mr. Justice Rehnquist spelled out his own conclusion that trials are covered as well.

Regardless of what type of proceeding was addressed, the question of whether under the Sixth Amendment the public has any right at all in the premises would appear to have been answered negatively by a majority of the Court, consisting of the Chief Justice and Justices Stewart, Powell, Rehnquist and Stevens. The public's First Amendment rights were not specifically decided by these same five Justices but were deemed satisfied in this case, if those rights exist at all, by virtue of the fact that no member of the public objected to the closure.[1]

As to the media, four members of the Court declined to reach the question of whether the press has a separate First Amendment right of attendance but nevertheless concluded that even if it did, its rights were satisfied by the "balancing" and "weighing" of relative values performed by the trial judge. Mr. Justice Powell decided that there is a separate First Amendment right in the press but agreed that it had been satisfied in this case, while Justices Brennan, White, Marshall and Blackmun concluded that if the press had a constitutional right – though no broader than the public's – it would require a showing of a number of "substantial probabilities" to overcome a "strict and inescapable necessity" before a criminal proceeding could be closed. 99 S.Ct. at 2938.

---

[1]With great respect, we would point out that the chance of a lay member of the public rising up and protesting a judge's order that he remove himself from a courtroom is so remote as not to warrant serious consideration. Even an informed member of the public might well feel that he would risk a contempt order by such apparently blatant conduct. Moreover, under the guidelines laid down by this Court, it would be virtually impossible for a layman to articulate any legal grounds for his remaining in the courtroom.

On the issue of whether – once the defendant and prosecutor have come to agreement – there need be any showing of any kind before a closure is proper, one can only say that the parts of Mr. Justice Stewart's opinion dealing with the rights of the public under the Sixth Amendment would appear to indicate that no such showing is necessary. The parts of his opinion treating the rights of the public and the press under the First Amendment are equivocal on this subject, because the public and the press may or may not have any First Amendment rights at all. The fifth vote necessary to constitute a majority – that of Mr. Justice Rehnquist – is unequivocally opposed to the necessity of any showing whatever, regardless of which Amendment or which party is involved.

Given the recitation above, it is hardly surprising that lower court judges have exhibited no small measure of confusion as to what they are supposed to do when faced with a motion to close all or any part of a criminal proceeding.

But one thing is certain: proceedings are being closed. Closure motions are being made, in fact, at a rate of better than one a day, and more than 50 percent of them are being granted. In view of the fact that *Gannett* was decided at the beginning of the summer, when many courtrooms are not in operation, when media reporting of the decision is seen by a relatively small audience, and when legal periodicals have not yet had an opportunity to comment upon the decision, it is clear that these initial closures are merely the hesitant beginning of an ever-increasing trend.

Moreover, *Gannett* is being read to sanction the closure of trials as well as pretrial hearings, with or without the consent of the prosecutor, and with or without any kind

of showing that a closure is required for any legitimate reason. These cases are detailed in the *Court Watch Study* submitted as the Appendix hereto.

This Study is important for still another reason. It demonstrates that a number of factual assumptions underlying Mr. Justice Stewart's opinion are simply not accurate when measured by what is actually taking place. For example:

(a) Mr. Justice Stewart and those joining his opinion felt that the "Sixth Amendment permits and even presumes open trials as a norm." 99 S.Ct. at 2908. This statement would appear to suggest that motions to seal criminal justice proceedings will, under this decision, be made infrequently and will be granted rarely and only in unusual cases with a substantial danger of prejudicial publicity.

As noted above, the *Court Watch Study* submitted as the Appendix clearly shows that closure motions are being made frequently and – given the advocate interest of the defense bar – will probably become a routine tool in criminal cases. The study shows 51 efforts to seal criminal proceedings made during the first seven, early-summer weeks following *Gannett*. The Study also shows that of these 51 efforts, 26 were successful, including a number of cases where publicity was minimal. In addition, several of these motions were granted for reasons having nothing to do with prejudicial publicity, such as embarrassment to a witness or embarrassment to a defendant. See, *e.g.*, Appendix, Nos. 10, 26, 30, 41, 46.

(b) This Court ruled that closure motions should only be granted in pretrial hearings involving confessions where there is a "reasonable probability" of prejudice to the defendant's right to obtain an impartial jury. 99 S.Ct. at 2912.

The *Court Watch Study* shows that closures have been granted in many other types of proceedings – including a probable cause hearing on an arrest warrant (Appendix, No. 10), three trials (Appendix, Nos. 3, 26, 41), a sentencing (Appendix, No. 9), and a guilty plea conviction (Appendix, No. 4), in addition to 21 pretrial proceedings and one prior restraint order forbidding publication. Appendix, including No. 27.

(c) This Court thought that the prosecutor would represent the "societal interest in an open trial." 99 S.Ct. at 2908 n.12. The *Court Watch Study* shows that in a substantial number of cases, prosecutors have supported closure motions (Appendix, Nos. 2, 4, 18, 20, 31, 40), in a few cases the prosecutors have opposed such motions, but in most cases the prosecutor has taken no position at all.

(d) This Court's opinion is being interpreted as giving *less* – rather than the same – rights to the press than to the public to attend and comment upon criminal justice proceedings.

The *Court Watch Study* shows that at least five courts have held proceedings where less rights were accorded the press than the public to attend and comment. These included four cases open to the public and closed to the press. Appendix, Nos. 12, 22, 24 and 48. One judge admitted the public and the press but imposed an order prohibiting the press from publishing what had occurred. Appendix, No. 27.

(e) This Court apparently assumed, without specifically deciding, that a member of the press or the public would generally be able to make a contemporaneous objection to a pretrial closure motion. For example, Mr. Justice Stewart noted that "none of the spectators present in the

courtroom, including the reporter * * *, objected when the defendants made the closure motion." 99 S.Ct. at 2912. And Mr. Justice Powell, while suggesting in his concurrence that members of the public or the press "must be given an opportunity to be heard," then added: "But this opportunity extends no farther than the persons actually present at the time the motion for closure is made * * *." *Id.* at 2916.

While the issue is not directly covered in the *Court Watch Study*, Amici can represent to this Court that in many instances the news reporter or member of the public appears at the courthouse only to find the doors locked and the court in session. Under these circumstances, it is virtually impossible, without notice of any kind, for the reporter, the public or their counsel to make any contemporaneous objection.

On at least one occasion in which a closure hearing was held, the question of closure was argued largely in secret without the participation of counsel for a newspaper objecting to closure. Furthermore, even though the judge later announced that he had decided against closing the preliminary hearing, he also disclosed that he had secretly heard and ruled upon evidentiary matters that would not be repeated in the open preliminary hearing that followed.

Thus, five Justices appear to have overlooked the frequent situation where even if there is some theoretical right to object, that right is meaningless because of the practicalities involved, including lack of notice and an inability to enter the courtroom.

In conclusion, the *Gannett* decision is being used and misused – substantively, procedurally and practically – to

censor criminal justice proceedings all across the nation, and this Court should either reverse that decision or clearly specify its narrow applicability in order to stop any further damage to the public's right to perceive how its courts are operating and what is actually transpiring in its courtrooms.

II

THE COURT SHOULD MAKE CLEAR THAT EVEN IF THE DECISION IN *GANNETT* STANDS, IT APPLIES ONLY TO PRETRIAL HEARINGS.

As noted above, the *Gannett* case dealt with a pretrial hearing, and the Court's specific holding was therefore presumably limited to that situation. Nevertheless, there were discussions by several Justices of constitutional rights in relation to closures at trial.

In brief, the four dissenting Justices would appear to adopt a "strict and inescapable necessity" test for the closing of trials as well as pretrial hearings, 99 S.Ct. at 2938; the Chief Justice has reserved all questions regarding trials; Mr. Justice Powell may believe there is some First Amendment interest to be protected, although the delineation of this protection insofar as the public is concerned is not clear; Justices Stewart and Stevens reserve the First Amendment question in the context of trials; and only Mr. Justice Rehnquist would hold flatly that there is no right in the public or the press to attend criminal trials.

Under these circumstances, we submit that the issue of closed trials should be a viable one, yet to be determined by a majority of the Court. We urge the Court to note probable jurisdiction in the instant case and to decide this issue favorably to Appellants.

On the question of whether the issue is a sufficiently important one, requiring immediate attention, we need only point to the fact, evidenced by the *Court Watch Study*, that trials are indeed being closed at an increasing rate, and *Gannett* is being relied upon as the legal basis for these closures.

The Virginia Supreme Court in this very case, based apparently on Mr. Justice Stewart's *dicta*, cited *Gannett* as its authority for upholding a trial court order entirely excluding the public and the press from a trial on the grounds that prejudicial press reports might be read by jurors and/or that people in the courtroom would distract the jury.

In urging this Court to rule in favor of Appellants, we need not repeat or even synthesize the eloquent dissent of Mr. Justice Blackmun. We would only emphasize his conclusion that the Sixth Amendment right to a public trial "reflects the tradition of our system of criminal justice that a trial is a 'public event' and that '[w]hat transpires in the court room is public property.' *Craig v. Harney*, 331 U.S. 367, 374 (1947)." 99 S.Ct. at 2922. The Sixth Amendment guarantee of a public trial is inextricably woven into the First Amendment guarantee of freedom of speech and press, because the administration of justice is one of the most important of governmental functions. For that reason, the local courthouse – especially during criminal trials – historically has been considered *the single most important public forum* we have.

Amici thus urge the Court to recognize the intended interface between the Sixth Amendment obligation to conduct trials in public and the First Amendment right of citizens to attend these trials and to use the information they obtain in the exercise of their political franchise. The

prohibition against public attendance at a criminal trial has the direct effect of suppressing information and comment protected by the First Amendment. This is not, therefore, a question of discretionary access as described in Mr. Justice Stewart's analysis,[2] but rather a matter of a public forum right which has been firmly vested for centuries in the public and the press. It is a right, therefore, that can only be extinguished, as explained more fully below, under the strictest constitutional test applicable to prior restraints.

We respectfully urge this Court to make these points explicitly clear to a legal profession – bench and bar – that is now confused and, worse, embarked on a course that can only convert one of our most cherished institutions into a star chamber-type process that is closed from public view.

III

THE COURT SHOULD USE THIS OPPORTUNITY TO REEXAMINE ITS REASONING IN *GANNETT*, EVEN AS TO PRETRIAL HEARINGS, PARTICULARLY IN THE LIGHT OF FACTORS NOT CONSIDERED IN THAT CASE.

Amici fully appreciate that it is most unusual for the Court to be asked, through the vehicle of another case, to reexamine one of its decisions within a matter of months after that decision has been rendered. We submit, however, that these are unusual circumstances. Seldom are the practical effects of a decision so immediately ap-

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[2] With great deference, however, we do believe, and would argue if given the opportunity, that there is a First Amendment right of access on behalf of both the public and the press.

parent. Seldom is it so clear so quickly that the effect of what the Court has done is to undermine the ordered application of justice and to prevent the public from viewing what is rightfully theirs.

The fact is that 89 percent of all indictments are disposed of during pretrial proceedings, so that any attempted distinction between a pretrial hearing and a trial on the basis of *importance* is an artificial one. An example recently occurred in Albany, New York, where a sealed pretrial hearing led to a secret guilty plea and conviction. See Appendix, No. 4. *Gannett* has had such a pernicious effect, in fact, that in another recent case there was a closed, secret conference to determine *whether* the pretrial hearing itself should be closed, despite the fact that the closure motion was totally unsupported by any proffered evidence. Appendix, No. 36.

This Court simply could not have perceived in *Gannett* that what is happening would in fact occur. As noted above, the factual assumptions upon which its decision was based have not proven out in a number of important ways. Yet the worst is yet to come. As the fall approaches, courts reopen, and word of the case more fully spreads throughout the profession – particularly to the criminal defense bar – the results will be even more startling.

Criminal defense attorneys will perceive that whether their clients are ultimately found innocent or guilty, they are better served by not having the prosecution's adverse evidence detailed in public and given publicity. Moreover, attorneys appointed to defend indigents may well feel called upon to file closure motions as a matter of course, for fear of being charged with ineffective assistance of counsel should they fail to do so.

Idealistically, prosecutors will fit the mold portrayed by Mr. Justice Stewart and will protect the public interest. Unfortunately, many will perceive their role as a more limited one. Their chances of having a conviction reversed will seem to them less likely if they agree to a closure motion than if they oppose it. Further, they may feel that their own witnesses will testify more freely – though not necessarily more accurately – in secret than they would under the scrutiny of the press and the public.

And what is a trial judge to do with a closure motion put forth by the defense and unopposed by the prosecution? Since this Court has spelled out no specific *standards* under its "reasonable probability of prejudice" test, 99 S.Ct. at 2912, that must be met by the proponent of closure, it would appear that the trial judge would have no legal grounds under *Gannett* for denying the motion.[3]

We are thus seeing only the beginning, not the apex, of the closure process.

But there are additional reasons why *Gannett* should be reexamined at this time. At least two facets of the overall problem were not presented to or dealt with by the Court in *Gannett*, and they deserve the Court's serious consideration.

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[3] The situation described above assumes that all parties and the court are acting essentially in good faith. One cannot be blind, however, to those occasions when police, prosecutors or even the courts are engaged in covering up mismanagement or corruption. A closed pretrial hearing, for example, is the perfect opportunity for pay-offs or improper bargains that bring prosecutions to a quick end.

A. Exclusion from Public Forums Is a Prior Restraint

The carrying out of criminal justice is inextricably intertwined with the most precious of First Amendment rights of expression because the operation of the courts – in their handling of criminal cases – so frequently raises questions of significant political importance in regard to the behavior of law enforcement officials, prosecutors, defense counsel, jurors and the general administration of justice.

This Court has long held that the exclusion of the public from a public forum which the public has a vested right to attend is a prior restraint under the First Amendment because it prohibits the speaker from speaking and the citizen from both listening and using the information for his or her own political or social purposes.

This Court's most recent enunciation of this prior restraint doctrine – as it applies to public forums – came in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1974).

In that case, this Court, through Mr. Justice Blackmun, addressed the issue of whether a municipally-owned auditorium could prohibit the public performance of a theatrical event in which there was nudity and obscenity without any finding that the performance was pornographic and therefore outside the protection of the First Amendment.

In ruling that government officials could not suppress the performance, the Court said:

> Respondents' action here is indistinguishable in its censoring effect from the official actions *consistently identified as prior restraints* in a long line of this Court's decisions. * * * The restraints took a variety of forms, with officials exercising

> control over different kinds of public places under the authority of particular statutes. All, however, had this in common: they gave public officials the power to deny use of a forum in advance of actual expression. [*Id.* at 552, 553; emphasis supplied; citation omitted.]

The Court continued: "Only if we were to conclude that live drama is unprotected by the First Amendment – or subject to a totally different standard from that applied to other forms of expression – could we possibly find no prior restraint here." *Id.* at 557.

The Court then went on again to state that exclusion of the public – or, in the alternative, suppression of the performance – was a prior restraint. And with regard to public forums, "[t]he settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Id.* at 559.

Following this Court's reasoning in *Southeastern Promotions*, Amici could contend that a criminal trial – the state's effort to take away a person's liberty – has as great or greater status as a public forum than does a "live drama" within any meaning of the term. It is, if anything, one of more significance, with more public impact, than a play in which no one's life or liberty is at stake, and our judicial system is not under scrutiny. By giving a judge the power to decide whether or not citizens will witness this drama, we are empowering public officials to deny use of a forum in advance of "actual expression" – the precise definition of censorship in *Southeastern Promotions*. *Id.* at 553.

A second case in which this Court found exclusion of the public from a public forum to be a prior restraint was

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). In that case, a real estate agent accused of blockbusting obtained an injunction against a neighborhood organization, forbidding the organization from using public streets to picket the agent. This Court found that the injunction against the use of public facilities for picketing was a "prior restraint" with a "heavy presumption" against its constitutional validity.

It is true, of course, that part of this Court's reasoning was based upon its concern for the suppression of pamphlets as well as the injunction prohibiting picketing. But the conduct of a criminal trial also results in the circulation of important information – in this instance, information about our court system – to the local community.

In *Organization for a Better Austin*, the real estate agent argued that he had a right to "privacy," a right not to be subjected to public criticism for his actions. But this Court replied that privacy is not a sufficient justification under the First Amendment "to stop the flow of information * * * to the public." *Id.* at 420.

In the case at bar, the judge, the prosecutor, and defense counsel are making the same privacy argument – that a defendant has a right to protect his privacy from public view by waiving his right to a public forum. But the public performance of justice is even less of a private affair than the behavior of a real estate broker, and the same prior restraint consideration which caused this Court to protect the giving and receipt of neighborhood views should be employed to protect the receipt of information about criminal trials.

The third case in which this Court has protected public forums against prior restraints is *Carroll v. President and Commissioners of Princess Anne*, 292 U.S. 175 (1968). This

case involved an injunction, obtained *ex parte*, by town officials against a white supremacy organization, prohibiting it from conducting anti-black and anti-semitic demonstrations on the court house steps in a racially tense town.

Alleging that the racist demonstration would "endanger the citizens of the County," the local court issued the injunction. Once again, this Court said that prohibiting attendance at a public forum constituted a prior restraint. The Court insisted upon "careful procedural provisions, designed to assure the fullest presentation and consideration of the matter * * *." *Id.* at 181.

While it is true that in the instant case a hearing of sorts was held, there are not specific findings of fact to justify any direct, immediate and irreparable injury to the administration of justice. It is difficult to define the precise reasons for the trial court's imposition of a prior restraint, other than a vague aversion to publicity and a protective attitude toward the sensibilities of jurors under scrutiny. Indeed, the results of a prior restraint here are all the more egregious because any possibly damaging publicity almost certainly has already become part of the public domain by virtue of having been revealed at the first of the defendant's prior trials.

The majority in *Gannett* stressed that any injury from exclusion is only temporary "once the damage of prejudice has dissipated" because a transcript of the suppression hearing is then made available. This justification seems entirely inconsistent with *Southeastern Promotions* and *Carroll*. Addressing the question of whether the prior restraint could be justified because there were alternative ways the public might be able to see the performance at a private, non-governmentally owned theater, this Court said in *Southeastern Promotions*:

> [I]t does not matter for purposes of this case that the board's decision [suppressing the performance] might not have had the effect of total suppression of the musical in the community. Denying use of the municipal facility under the circumstances present here constituted prior restraint.
>
> * * *
>
> Only if we were to conclude that live drama is unprotected by the First Amendment – or subject to a totally different standard from that applied to other forms of expression – could we possibly find no prior restraint here. [420 U.S. at 556, 557.]

And the Court in *Carroll* pointed out that since it is vital to the operation of democratic government that citizens have facts and ideas on important issues before them, a delay of even a day or two may in some instances be of crucial importance. 393 U.S. at 182. Certainly information about the criminal justice process – of the actions of police, prosecutors, defense counsel, jurors and judges – is even more fungible than the ideas communicated by a musical comedy or even by a demonstration.

To force the press to wait weeks or months in order to report what occurs in the courtrooms of this nation is to impose stop-watch censorship on the First Amendment.

A fourth case in which this Court placed First Amendment prior restraint protections on public forums is *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), where this Court said: "* * * Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to

express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities * * *. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 96.

Therefore, what goes on in a courtroom is a political expression on issues of the highest importance to the public, and Amici would urge that it is of equal or greater importance than the racial demonstrations in *Carroll,* the picketing in *Mosely* and *Organization for a Better Austin,* and the musical in *Southeastern Promotions.* It is, in fact, information as crucial as the pamphlet in *Near* or the study in *New York Times Co. v. United States* and must be accorded precisely the same protection against prior restraints.

We recognize, of course, that too hasty a reaction to the cases cited above might lead one to argue that they all relate to protests by those who seek to speak as opposed to those who seek to hear. But an analogy will demonstrate that concomitant rights are at work. Someone granted the right to make his speech in an empty field, or in a locked and empty room, is as effective a denial of his First Amendment rights as if he were precluded from speaking at all. Communication is a two-way process: speaking (by way of voice, pamphlet, parading, or whatever) and receiving the information imparted. *Cf. Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748 (1976). Can anyone doubt that if an audience were ordered to plug its ears, this would be a dual constitutional violation – a violation of the rights of the speaker who was never heard, and a violation of the rights of the audience that was never allowed to hear?

And so, properly construed, the public forum cases cited above lead inexorably to the conclusion that the danger of a prior restraint relates as much to the inability of the community to be informed as it does to the speaker's inability to impart information. Precisely the same process is at play in the courtroom. The defendant has a right to be heard, but the members of the public and the press have a separate right of their own to receive information, not just because the defendant may want them to receive it, but because the information, ranging across the entire spectrum of courtroom activities, is of crucial importance for the public to have. The public's right is not just the right to hear the defendant. It is broader: the right to absorb the entire criminal adjudication process. Just as one speaker on a panel could not waive the right of the entire panel to be heard and thereby preclude the audience from listening to the other speakers, so here a defendant cannot, by the device of waiving his own Sixth Amendment rights, prevent the public from viewing, hearing and using all events occurring at a criminal trial.

Because the cases above cover the sitaution here, the standard to be applied is one of "direct and immediate injury to the fair administration of justice," provable by a clear preponderance of specific evidence in order to overcome the "heavy burden" which this Court has established for prior restraints. *Near v. Minnesota, supra; New York Times Co. v. United States, supra,* 403 U.S. at 727.

Included in this standard must be a finding that the injury is "irreparable" – that there is no remedy in law for the damage to the administration of justice by concurrent or subsequent actions of any trial or appellate court able to repair the injury by all of the means suggested by *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 563 (1976), as well

as by Mr. Justice Blackmun in his dissent in *Gannett*, but also including a directed verdict, dismissal, mistrial or conviction reversal.[4]

If a criminal trial is a presumptively "public forum," as we contend, a prior restraint cannot be imposed on the public carrying out of that trial except upon a showing:

(a) that there will be a direct and immediate injury to the fair administration of justice;

(b) that the injury is irreparable because no trial or appellate court can repair the damage by any means, including a directed verdict, dismissal, mistrial, or a reversal of conviction; and,

(c) that there are no other reasonable alternatives to prevent this injury.

B. The Court May Have Eliminated an Effective Appeal of Closure Orders in Most Cases.

The Court is fortunate in having before it a case in which Appellants were at least deemed by the Virginia courts to have sufficient standing to appeal, even though their appeal was subsequently dismissed on the merits. In many cases, however, neither the public nor the press is being allowed to appeal closure orders, and this unhappy result is a direct consequence of the lower courts' reading of *Gannett*.

In *Gannett*, five Justices apparently held that the public and the press have no Sixth Amendment rights whatever that would entitle them to attend a criminal pretrial hear-

[4] An alternative, though less desirable, substantive standard would be that adopted by the American Bar Association Committee. *See:* American Bar Association Standards Relating to the Administration of Criminal Justice, "Fair Trial and Free Press" (1978), adopting the "clear and present danger" test.

ing – and perhaps a criminal trial itself. If that same ruling is applied to the public and the press in regard to their First Amendment rights, the logical result is that no one other than the prosecutor has standing to challenge on appeal a closure order, including one entered for the specific purpose of furthering corruption or other illegal conduct.

Moreover, even under the view of Mr. Justice Powell, who found a First Amendment right and thus a right to be heard, "* * * it would be entirely impractical to require criminal proceedings to cease while appellate courts were afforded an opportunity to review a trial court's decision to close proceedings." 99 S.Ct. at 2915.

Thus, no combination of Justices would appear at this time to grant either the public or the press a sufficient interest in closure proceedings so that they could appeal in time to keep the courtrooms open. If the proceedings do not "cease," using Mr. Justice Powell's term, so that a closure can immediately be tested on appeal, it is obvious that even where parties are accorded standing to appeal, the issue of closure will be mooted by the time an appellate ruling is forthcoming. Even more ominously, if a majority of the Court does not find a First or Sixth Amendment right in either the public or the press, there will be no one with standing to appeal at all, once a prosecutor has decided not to oppose the closure motion. Surely the Court could not have intended any such result, particularly when the legality or propriety of the prosecutorial function itself may be what Appellants are attempting to challenge on appeal.[5]

[5] *See:* Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press," American Bar Association Legal Advisory Committee on Fair Trial and Free Press, (1976), adopting notice and other procedural standards for closure. The draft was prepared in 1975 and approved by the ABA House of Delegates in 1976.

IV

THE COURT HAS RELIED UPON A PROBABILITY OF DANGER AT TRIAL THAT IT HAS SPECIFICALLY DISCOUNTED IN ANOTHER CASE.

We would finally point out that part of the underpinning of the Court's *Gannett* decision is the danger of publicity arising out of a pretrial hearing that will adversely affect the defendant at trial. Mr. Justice Stewart's opinion states that "The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial." 99 S.Ct. at 2905.

Yet when this Court was faced with precisely the same type of argument in *Nebraska Press Ass'n v. Stuart, supra,* its answer was that a prior restraint was not sustainable in part precisely *because* of the speculative nature of trying to gauge the impact of adverse publicity on a subsequent trial. The Court said:

> Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pretrial publicity *could* impinge upon the defendant's right to a fair trial." (Emphasis added.) *His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.*
>
> * * *

> We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy v. Florida,* 421 U.S. 794 799 (1975). Appellate evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice. [427 U.S. at 562, 563, 565; emphasis added.]

In *Nebraska Press Ass'n,* the adverse publicity related to six murders and necrophilia. If there was ever a case where the trial court could assume that publicity would harm the defendant, it was in that case. Yet the danger was deemed insufficient to allow the issuance of a prior restraint because there were alternative methods of dissipating any possible adverse impact on the defendant.

In *Gannett,* the publicity was of a far less harmful nature, and in the instant case, there is no record of actual or potential adverse publicity at all. Moreover, we are here dealing with a trial itself, rather than a pretrial hearing that could affect the trial, and there are obvious ways of protecting jurors once they are selected. Whether in a pretrial or trial setting, however, the impact of adverse publicity on jurors is, as pointed out in *Nebraska Press Ass'n,* "of necessity speculative, dealing * * * with factors unknown and

unknowable." 427 U.S. at 563.[6] And the same alternative methods of dissipating the possible adverse effects of publicity are present here.

CONCLUSION

For each of the reasons outlined above, as well as those set forth in the Jurisdictional Statement, we respectfully urge the Court to note probable jurisdiction, reverse the judgment below, and in the process reexamine its *Gannett* decision with a view toward granting the public and the press the right to require open courtrooms except under the most stringent and exceptional circumstances.

Respectfully submitted,

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[6]It is also interesting that in *Nebraska Press Ass'n* this Court found wholly insufficient the furnishing of a transcript of the proceeding, 427 U.S. at 561, whereas in *Gannett* the transcript was treated as almost of equal importance as the open proceeding itself. 99 S.Ct. at 2912.

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Supreme Court, U. S.
FILED
SEP 5 1979
MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v.

Appellants,

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v.

Appellants,

RICHARD H.C. TAYLOR,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
THE ASSOCIATED PRESS MANAGING EDITORS
THE NATIONAL ASSOCIATION OF BROADCASTERS
THE NATIONAL NEWSPAPER ASSOCIATION
THE NATIONAL PRESS CLUB
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI
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COURT WATCH STUDY

EFFORTS TO CLOSE CRIMINAL JUSTICE PROCEEDINGS INITIATED, DECIDED OR PENDING FROM JULY 2, 1979 (GANNETT v. DE PASQUALE) TO AUGUST 23, 1979

Compiled by The Reporters Committee for Freedom of the Press

In cooperation with:

The American Newspaper Publishers Association
The American Society of Newspaper Editors
The Associated Press
The Associated Press Managing Editors
Gannett Newspapers
The National Association of Broadcasters
The National Newspaper Association
The Radio-Television News Directors Association
The Society of Professional Journalists
United Press International

SUMMARY

Closures enforced or upheld on appeal since July 2, 1979	- 26 cases
Closure motions refused or withdrawn	- 21
Closure motions made but not acted upon	- 3
Direct prior restraints on publication	- 1
	51

Types of proceedings sought to be closed:

Pre-indictment	1
Pretrial	38
Trial or conviction	10
Post-Trial	2
	51

#	CITY CASE	TYPE OF PROCEEDING CLOSURE MOTION BY	ACTION BY COURT	DATE	COURT'S GROUNDS FOR SEALING PROCEEDING
1.	Media, Pa. Murder	Pretrial Defense	CLOSED to press & public UPHELD on appeal	3/28/77 7/2/79	State court closure rule
2.	Baltimore, Md. Tax fraud	Pretrial *(Fed) Defense & Prosec'n	CLOSED to press & public PENDING U.S. Court of Appeals	12/1/77 8/1/79	Grand jury secrecy
3.	Hanover Co., Va. Murder	Trial Defense	CLOSED to public & press UPHELD on appeal	9/11/78 7/9/79	Prejudice to jury
4.	Albany, N.Y. Assault	Guilty Plea Conviction Defense & Prosec'n	CLOSED to public & press UPHELD on appeal	3/7/79 8/9/79	Prejudice to jury
5.	NYC, N.Y. Murder	Pretrial Defense	CLOSED to public & press UPHELD on appeal	3/20/79 7/9/79	Prejudice to jury
6.	Los Angeles, Cal. Attempted Murder	Pretrial Defense	CLOSED to public & press UPHELD on appeal	4/23/79 6/79	Prejudice to jury
7.	Berkeley, Cal. Robbery	Pretrial Defense	Closure REFUSED	7/2/79	
8.	Oakland, Cal. Murder	Pretrial Defense	Closure motion WITHDRAWN	7/2/79 7/5/79	
9.	NYC, N.Y. Attempted Murder	Sentencing Defense	Closure REFUSED	7/24/79	
10.	Buffalo, N.Y. Assault	Prob. cause hearing Defense	CLOSED to public & press	7/6/79	Embarrass-ment to sus-pect
11.	Madison, Wis. Assault	Pretrial Defense	Closure REFUSED PENDING on appeal	7/6/79 8/1/79	
12.	Conway, S.C. Murder	Pretrial Defense	CLOSED to press OPEN to public	7/9/79	Prejudice to jury
13.	Omaha, Neb. Murder	Pretrial Defense	CLOSED to public & press	7/10/79	Prejudice to jury

*Fed = Federal Court Closures.
All Others Are State Closures.

# CITY CASE	TYPE OF PROCEEDING CLOSURE MOTION BY	ACTION BY COURT	DATE	COURT'S GROUNDS FOR SEALING PROCEEDING
14. Oakland, Cal. Murder	Pretrial Defense	Closure REFUSED Closed to public & press on appeal	3/21/79 7/13/79	State closure law
15. Annapolis, Md. Arson	Pretrial Defense	CLOSED to public & press	7/13/79	Prejudice to jury
16. Rochester, N.Y. Murder	Pretrial Defense	Closure REFUSED	7/16/79	
17. Littleton, Colo. Murder	Trial Defense	Closure REFUSED	7/17/79	
18. Okla. City, Ok. Illegal Influence	Pretrial Prosecution *(Fed)	Closure REFUSED	7/18/79	
19. Seattle, Wash. Murder	Pretrial Defense *(Fed)	Closure REFUSED	7/27/79	
20. Albany, N.Y. Burglary	Pretrial Defense & Prosec'n	CLOSED to public & press	7/19/79	Prejudice to jury
21. Madison, Wis. Murder	Pretrial Defense	Closure REFUSED	7/20/79	
22. Albany, N.Y. Drugs	Pretrial Defense	CLOSED to press OPEN to public	7/20/79	Prejudice to jury
23. Golden, Colo. Drugs	Pretrial Defense	Closure motion PENDING	7/23/79 8/1/79	
24. Hunt., W. Va. Kidnapping	Pretrial Defense	CLOSED to press OPEN to public	7/24/79	Prejudice to jury
25. Albany, N.Y. Sodomy	Trial Witness & Defense	Closure REFUSED	7/25/79	
26. Westminster, Md. Rape	Trial (non-jury) Defense	CLOSED to public & press	7/25/79	Embarrass-ment to victim

#	CITY CASE	TYPE OF PROCEEDING CLOSURE MOTION BY	ACTION BY COURT	DATE	COURT'S GROUNDS FOR SEALING PROCEEDING
27.	Oneonta, Ala. Murder	Trial Judge	NO PUBLICATION ORDER VS. PRESS	7/26/79	Prejudice to jury
28.	Mt. Carroll, Ill. Murder	Pretrial Defense	CLOSED to public & press	7/28/79	Prejudice to jury
29.	Albany, N. Y. Burglary	Pretrial Defense	Closure REFUSED	7/30/79	
30.	Kearney, Neb. Rape	Pretrial Defense	CLOSED to public & press	7/31/79	Embarrassment to victim
31.	N. Bed., Mass. Kidnap/Murder	Pretrial Defense & Prosec'n	CLOSED to public & press	7/20/79	Prejudice to jury
32.	Nash., Tenn. Bribery	Trial *(Fed) Defense	Closure motion PENDING	8/2/79 8/6/79	
33.	Papillion, Neb. Murder	Pretrial Defense	CLOSED to public & press	7/30/79	Prejudice to jury
34.	Aurora, Neb. Embezzlement	Pretrial Defense	CLOSED to public & press	7/31/79	Prejudice to jury
35.	Jefferson, Ohio Kidnap/Murder	Pretrial Defense	CLOSED to public & press	8/2/79	Prejudice to jury
36.	Okla. City, Ok. Murder	Pretrial Defense	Closure motion WITHDRAWN	7/27/79 7/30/79	
37.	Ellsworth, Maine Murder	Pretrial Defense	Closure REFUSED	7/27/79	
38.	Des Moines, Iowa Counterfeiting	Trial *(Fed) Defense	Closure motion PENDING	7/25/79 8/6/79	
39.	Okla. City, Ok. Murder	Pretrial Defense	Closure REFUSED	7/26/79	

# CITY CASE	TYPE OF PROCEEDING CLOSURE MOTION BY	ACTION BY COURT	DATE	COURT'S GROUNDS FOR SEALING PROCEEDING
40. N. Platte, Neb. Murder	Pretrial Defense & Prosec'n	Closure REFUSED	8/13/79	
41. Charlotte, N.C. Rape	Trial Prosecution	CLOSED to public & press	7/12/79	Embarrassment to witness
42. Charleston, W.Va. Rape	Trial * (Fed) Defense	Closure REFUSED	8/16/79	
43. Honolulu, Hawaii Attempted Murder	Pretrial Defense	Closure REFUSED	7/18/79	
44. Riverhead, N.Y. Murder	Pretrial Defense	CLOSED to public & press Closure REVERSED	8/8/79 8/15/79	Prejudice to jury
45. Grand Rapids,Mich. Murder	Pretrial Defense	Closure REFUSED	7/2/79	
46. Honolulu, Hawaii Rape	Pretrial Defense Trial Defense	CLOSED to public & press Closure REFUSED	7/23/79 7/23/79	Embarrassment to defendant
47. Napa, Cal. Murder	Pretrial Defense	CLOSED to press & public	7/18/79	State Closure Law
48. Antigo, Wisc. Murder	Pretrial Defense & Prosec'n	OPEN to public CLOSED to press (except press which agreed to suppress news)	8/7/79	Prejudice to jury
49. Oakland, Cal. Murder	Pretrial Defense	CLOSED to public & press	8/16/79	State Closure Law
50. Dallas, Oregon Assault	Pretrial Defense	Closure REFUSED	8/10/79	
51. NYC, N.Y. Bribery	Post-trial *(Fed) Defense	CLOSED to public & press	7/31/79	Prejudice to future jury

U.S. SUPREME COURT ALLOWS SECRET PENNSYLVANIA HEARING

1. March 28, 1977: Media, Pennsylvania; Court of Common Pleas; Murder case against W.A. Boyle for the death of Joseph Yablonski: Pretrial proceeding to suppress evidence.

   Defense counsel made motion to seal pretrial proceedings and transcripts under Pennsylvania court rule that permits total secrecy of pretrial proceedings merely on the motion of the defense. Prosecution did not oppose. Philadelphia Inquirer and other news organizations intervened (this case was consolidated with two other closure motions in two unrelated murder trials).

   Judges ordered sealed proceedings and sealed transcripts in all three cases.

   April 1978: Pennsylvania Supreme Court upheld trial court closures and transcript sealings.

   July 2, 1979: U.S. Supreme Court denied review. Philadelphia Newspapers, Inc. v. Jerome, No. 78-155, appeal dismissed (U.S. Sup. Ct. July 2, 1979).

FEDERAL APPEALS COURT TO DECIDE SECRET TAX CASE HEARING

2. December 1, 1977: Baltimore, Maryland; U.S. District Court; Influence peddling and tax evasion case against Mr. & Mrs. Hancho Kim, an associate of Korean businessman Tongsun Park: Pretrial proceeding for discovery of evidence, to suppress evidence and to dismiss the indictment.

   U.S. attorney and defense counsel made motion to seal pretrial proceedings and accompanying briefs on the grounds that it was necessary in order to preserve grand jury secrecy.

   Judge ordered proceedings closed, documents and transcripts of proceedings sealed and barred press and the public from the courtroom, citing the necessity for grand jury secrecy. Baltimore Sun Newspapers attempted to intervene: intervention was denied and the Sun Newspapers filed a suit.

   April 10, 1978: U.S. District Court affirmed the ruling. Sun Newspapers appealed.

   August 1, 1979: Appeal pending before U.S. Court of Appeals, 4th Cir.

   A.S. Abell, Co. v. Miller, NO. M-78-364 (D. Md. April 10, 1978).

VIRGINIA SUPREME COURT UPHOLDS SECRET TRIAL

3. September 11, 1978: Hanover County, Virginia; Circuit Court; Motel murder case trial.

   Defense counsel made motion to close entirely to the public and the press the fourth trial (three others ended in a mistrial) on the grounds that news accounts might prejudice the defendant's right to an impartial jury because the jury might read news reports of evidence sought to be introduced but not introduced: Prosecution did not object.

   Judge ordered the trial closed on grounds of prejudicial publicity and inadequate courtroom space. Richmond Times-Dispatch

and News Leader appealed the sealed trial to the Virginia Supreme Court.

July 9, 1979: Virginia Supreme Court upheld the secret trial, citing Gannett.

August 14, 1979: Richmond Newspapers filed notice of appeal in U.S. Supreme Court.

In re Richmond Newspapers, Inc., appeal denied, No. 781598, petition for mandamus denied No. 781599, petition for prohibition denied, No. 781600 (Va. July 9, 1979).

NEW YORK APPEALS COURT UPHOLDS GUILTY PLEA CONVICTION SECRECY

4. March 7, 1979: Albany, New York; Albany County Court; Assault case: Pretrial proceeding to suppress evidence on grounds that news accounts of co-defendant's confession might prejudice defendant's right to obtain an impartial jury. Prosecutor joined the motion. Co-defendant did not oppose the motion.

Judge ordered co-defendant proceeding sealed. An Albany Times-Union reporter tried to enter the courtroom during the proceeding but was not permitted to do so.

After the closure was ordered, defendant entered a plea of guilty, a proceeding which was also closed: Times-Union filed appeal seeking to declare the closure order invalid.

August 9, 1979: New York Supreme Court Appellate Division upheld the secret proceeding.

Hearst Corporation v. Clyne, No. 35510 (N.Y. Sup. Ct. App. Div. August 9, 1979).

NEW YORK APPEALS COURT UPHOLDS NEW YORK CITY SUBWAY MURDER CASE SECRECY

5. March 20, 1979: New York City; Supreme Court, Bronx County; Subway murder case against youth treated as an adult under Youth Offender Act: Pretrial proceeding to suppress confession.

Defense counsel made motion to seal pretrial proceeding on grounds that publicity would be prejudicial to the defendant's right to obtain an impartial jury: Prosecution opposed the closure. New York Daily News filed a motion in objection to the closure.

Judge ordered the proceedings closed on grounds of prejudicial publicity: New York News appealed to the Appellate Division which upheld the trial judge: New York News appealed to the Court of Appeals.

July 9, 1979: New York Court of Appeals affirmed the closure citing Gannett.

In re Merola, No. 353 (N.Y. Ct. App. July 9, 1979).

CALIFORNIA APPEALS COURT TO DECIDE SYNANON PRETRIAL SECRECY

6. April 23, 1979: Los Angeles, California;

Superior Court, Los Angeles County; Soliciting murder and attempted murder case against the founder of Synanon and others charged with placing a poisonous snake in a lawyer's mailbox: Pretrial proceeding to suppress evidence.

Defense counsel made motion to seal pretrial suppression hearing on the grounds that news accounts might prejudice defendant's right to obtain an impartial jury, citing California Penal Code Seciton 868 requiring closed pretrial proceedings merely upon the motion of the defense. Prosecution apparently did not oppose. Los Angeles Times and other press groups opposed.

Judge ordered the proceedings sealed. Los Angeles Times and other press groups appealed.

May 4, 1979: Superior Court upheld the secret proceeding. Los Angeles Times and other press groups appealed separately.

June 1979: California Court of Appeals denied the appeals of Los Angeles Times and other press groups. Los Angeles Times and other press groups appealed. California Supreme Court denied the appeals.

In re. Charles Dederich, No. C281341 (Calif. Super. Ct. May 4, 1979).

CALIFORNIA ROBBERY PRETRIAL CLOSURE REJECTED

7. July 2, 1979: Berkeley, California; Alameda Cnty. Superior Court; Bank robbery case; Pretrial suppression proceeding.

   Defense counsel for one of six co-defendants moved to seal pretrial suppression hearing on the grounds that news accounts might prejudice defendant's right to obtain an impartial jury, citing California Penal Code Section 868 requiring closed pretrial proceedings merely upon the motion of the defense. One co-defendant opposed motion citing the right to a public trial provision of the Sixth Amendment. Prosecution took no position on the motion. Oakland Tribune intervened.

   Judge denied closure motion on grounds that state law was unconstitutionally overbroad and because at least one co-defendant wanted the pretrial proceeding open.

   State v. Brooks, No. 74625 (Calif. Super. Ct., Alameda County, July 2, 1979).

CALIFORNIA MURDER PRETRIAL CLOSURE MOTION WITHDRAWN

8. July 2, 1979: Oakland, California; Alameda County Superior Court; First degree murder case: Pretrial suppression hearing.

   Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts would prejudice the defendant's right to obtain an impartial jury. Prosecutor opposed the motion. San Francisco Examiner reporter verbally opposed the motion. Judge took motion under consideration.

   July 5, 1979: Motion withdrawn; charges against defendant reduced.

   State v. Reilly, N0. 663-42 (Calif. Super. Ct., Alameda County July 5, 1979).

NEW YORK CITY POST-CONVICTION SENTENCING CLOSURE REJECTED

9. July 5, 1979: New York City; Supreme Court, New York County; Attempted murder case: Post-conviction sentencing hearing.

   Defense counsel made motion to seal a sentencing hearing for defendant convicted of attempted murder, citing danger of pre-judicial publicity to the defendant in a second but unrelated pending murder charge against him. Prosecution opposed the closure motion. Newsday and The New York Times filed a motion opposing the closure.

   July 24, 1979: Judge declined to seal the proceedings.

   People v. Wright, No. 1396/78 (N.Y. Sup. Ct., N.Y. County July 24, 1979).

BUFFALO PROBABLE CAUSE HEARING CLOSED

10. July 5, 1979: Buffalo, New York; Municipal Court; Assault case against Roman Catholic nun accused of mistreating a student: Probable cause hearing on arrest warrant.

    Defense counsel made motion to seal hearing on grounds of the danger of personal embarrassment to defendant. Prosecution and press did not object.

    Judge ordered proceeding sealed.

    Dickerson v. Bronisia, No. 2C22233 (Buff. Mun. Ct. July 6, 1979).

WISCONSIN APPEALS COURT TO DECIDE PRETRIAL ASSAULT CASE SECRECY

11. July 6, 1979: Madison, Wisconsin; Dane County Circuit Court; Baseball bat assault case: Pretrial suppression proceeding.

    Defense counsel made motion to close upcoming trial on grounds that news accounts might prejudice the defendant's right to obtain an impartial jury in another pending, but unrelated trial. Prosecutor and press made no objection.

    Judge denied motion on grounds that there were alternatives to closure available to defendant. Defense counsel appealed to state court of appeals.

    July 8, 1979: Judge for appeals court issued a stay of proceedings until the full court could consider the appeal.

    August 1, 1979: Appeal pending.

    People v. Allen, 79-78CF173 (Wisc. Cir. Ct., Dane County July 8, 1979).

SOUTH CAROLINA MURDER PRETRIAL MOTIONS PROCEEDING CLOSED TO PRESS, OPEN TO PUBLIC

12. July 9, 1979: Conway, South Carolina; County Circuit Court; Murder, rape, assault and battery with intent to kill case: pretrial motions proceeding.

    Defense counsel made motion to seal pretrial motions proceeding to the press, but not the public, on grounds that publicity could jeopardize a fair trial. Prosecution did not

oppose. Press verbally objected.

Judge ordered closure to press but not to public.

State v. Woomer, No. 79-GS-26-203 (S.C. Cir. Ct., Horry County July 9, 1979).

NEBRASKA PRETRIAL MURDER PROCEEDINGS CLOSED

13. July 10, 1979: Omaha, Nebraska; Douglas County District Court; First degree murder case: Pretrial proceeding to suppress evidence.

    Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor did not oppose the motion. Omaha World-Herald filed motion in opposition. Motion dismissed.

    Judge ordered proceeding sealed to the press and the public. No appeal has been taken as of August 1.

    State v. Harper, No. 104-288 (Neb. Dist. Ct., Douglas County July 10, 1979).

COURT RULES OAKLAND BINGO MURDER PRELIMINARY HEARING SHOULD HAVE BEEN CLOSED

14. March 21, 1979: Oakland, California; Oakland Municipal Court; Bingo game murder case: Preliminary hearing on sufficiency of evidence to bind defendants for trial at Alameda County Superior Court.

    Defense counsel made motion to seal prelimianary hearing under California closure law. Prosecutor and press opposed the motion. Opposition filed by Oakland Tribune, San Francisco Examiner and San Francisco Chronicle.

    Judge denied closure motion. Preliminary hearing was held open. Case certified to Alameda County Superior Court.

    July 13, 1979: Defense Counsel made motion to dismiss due to defendant's deprivation of a closed preliminary hearing in municipal court. Prosecutor opposed this motion.

    Citing Gannett, Judge dismissed case on ground that defendants had been deprived of closed preliminary hearing in municipal court. Defendants subsequently re-arrested and indicted in municipal court.

    People v. Brown, No. 68703 (Calif. Alameda County Superior Court, July 13, 1979).

ANNAPOLIS ARSON CASE PROCEEDINGS CLOSED

15. July 13, 1979: Annapolis, Maryland; Anne Arundel County Court; Arson case: Pretrial proceedings to suppress incriminating statement and other evidence.

    Defense counsel made motion to seal pretrial proceedings on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution opposed the motion. Press verbally objected.

    Judge ordered the proceeding closed and indicated that, based on Gannett, he might even close the trial.

    People v. Beachem, No. 22083 (Md., Anne Arundel County Ct. July 13, 1979).

ROCHESTER PRETRIAL MURDER PROCEEDINGS KEPT OPEN

16. July 16, 1979: Rochester, New York; Monroe County Court; Murder case: Pretrial proceeding to suppress evidence.

    Defense counsel made motion to seal pretrial proceeding on grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor opposed the motion.

    Judge denied motion on grounds that an insufficient showing had been made that there would be jury bias from news reports.

    People v. Taylor, No. 263/79 (N.Y., Monroe County Ct. July 16, 1979).

COLORADO MURDER TRIAL KEPT OPEN

17. July 17, 1979: Colorado; Littleton Judicial District Court; Murder case: trial.

    Defense counsel made motion to close trial on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution opposed. No reported press objection.

    Judge denied motion.

    People v. Bartowsheski, No. 79CR-516 (Colo., 18th Dist. July 17, 1979).

U.S. ATTORNEY LOSES EFFORT TO SEAL ALL PRETRIAL PROCEEDINGS

18. July 18, 1979: Oklahoma City, Oklahoma; U.S. District Court; Conspiracy charge against a state senator and three others to influence bank loan case: Pretrial proceeding to suppress evidence.

    U.S. Attorney made motion to seal all pretrial proceedings and documents on the grounds that news accounts might prejudice the

government's and the defendant's right to obtain an impartial jury. Defense counsel opposed motion, citing right to public trial provision of the Sixth Amendment. Daily Oklahoman opposed motion.

Judge denied closure motion on the grounds that Gannett can only be invoked by the defense and not by the prosecution.

U.S. v. Stipe, No. 79-123 (D. Okla. July 18, 1979).

U.S. DISTRICT COURT DENIED MOTION TO SEAL PRETRIAL MURDER CASE SECRECY

19. July 19, 1979: Seattle, Washington; U.S. District Court; Murder case: Pretrial proceeding to suppress evidence.

Defense counsel made motion to seal pretrial proceedings on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution opposed motion: Seattle Times and Seattle Post-Intelligence intervened.

July 27, 1979: Judge denied the motion to seal proceeding on grounds that an insufficient showing had been made that there would be jury bias from news reports.

U.S. v. Baker, No. CR 79-159 (W.D. Wash. July 19, 1979).

ALBANY JUDGE SEALS POLICE BURGLARY PRETRIAL PROCEEDINGS

20. July 19, 1979: Albany, New York; Albany County Court; Burglary case against two suspended police officers: Pretrial proceeding to suppress incriminating statements.

Defense counsel made motion to seal pretrial proceeding from the press and public on grounds that news accounts would prejudice the defendant's right to obtain an impartial jury. Co-defense counsel and prosecutor joined in the motion. Knickerbocker News reporter verbally protested the motion.

Judge ordered proceedings sealed to the press and the public and transcripts sealed until a verdict or other disposition is reached.

People v. Buchanan and Vita, No. 3036-79 (N.Y., Albany County July 19, 1979).

WISCONSIN MURDER CASE PRETRIAL PROCEEDING KEPT OPEN

21. July 20, 1979: Madison, Wisconsin; Dane County Circuit Court; Murder case: Pretrial proceeding to suppress evidence.

Defense counsel made motion to seal pretrial proceeding from the press but not the public on grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution and the Wisconsin Freedom of Information Council opposed the motion.

Judge refused to order closure.

People v. Drogsvold, No. 79-CF 347 (Wisc., Cir. Ct., Dane County July 20, 1979).

ALBANY JUDGE EXCLUDES PRESS, ADMITS PUBLIC IN DRUG PROCEEDINGS

22. July 20, 1979: Albany, New York; Albany County Court; Illegal drug possession case: Pretrial suppression involving a confession.

Defense counsel made motion to seal pretrial proceeding from the press but not the public on the grounds that news accounts would prejudice the defendant's right to obtain an impartial jury. Prosecutor opposed the motion. Knickerbocker News reporter present in courtroom verbally objected.

Judge ordered proceedings sealed to the press but permitted public to attend and issued an order to the public not to disclose to anyone what occurred during the proceeding. Proceeding adjourned until August 22.

August 1, 1979: Order remains in effect. Knickerbocker News planning to appeal.

People v. Sullivan, No. 3721-79 (N.Y., Albany County August 1, 1979).

COLORADO COURT TO DECIDE DRUG CASE SECRECY MOTION

23. July 23, 1979: Colorado; Golden Judicial District Court; Conspiracy to dispense dangerous drugs case: Pretrial proceeding to suppress evidence.

Defense counsel for two of 23 defendants made motion to seal pretrial proceeding on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution took no position. No reported press objection.

August 1, 1979: Closure motion pending, Golden Judicial District Court.

People v. Casey, No. 79-CR496 (1st Dist. July 23, 1979).

WEST VIRGINIA MURDER PRETRIAL CLOSED TO PRESS, OPEN TO PUBLIC

24. July 24, 1979: Huntington, West Virginia; Cabell County Circuit Court; Kidnapping case: Pretrial proceeding to suppress evidence.

Defense counsel made motion to seal pretrial proceeding to press, but not to public, on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution did not oppose. No reported press objection.

Judge ordered the proceeding closed to the press, but not the public.

People v. Warth, No. 79-C13 (W. Va. Cir. Ct., Cabell County July 24, 1979).

ALBANY SODOMY TRIAL KEPT OPEN

25. July 25, 1979: Albany, New York; Albany County Court; Sodomy case: trial.

Witness' counsel made motion to close trial during witness' testimony on grounds that news accounts of the testimony would prejudice the witness' right to obtain an impartial jury in a later trial on a pending related charge. The defense counsel joined the motion. Press did not oppose

the motion.

Judge denied motion to close the trial.

People v. Angus, No. 104-69-78 (N.Y., Albany County July 25, 1979).

MARYLAND RAPE TRIAL CLOSED

26. July 25, 1979: Westminster, Maryland; Carroll County Circuit Court; Rape case: trial.

Defense counsel made motion to close trial on grounds that public trial would be embarrassing to victim. Prosecution did not oppose. Press attempted to object but was denied.

Judge ordered the trial closed.

State v. Hicks, No. 5003 (Md. Cir. Ct., Carroll County July 25, 1979).

ALABAMA PRESS BARRED FROM PUBLISHING MURDER JURY SELECTION PROCEEDING

27. July 26, 1979: Oneonta, Alabama; Blount County Circuit Court; First degree murder case: trial.

Judge, on his own motion, issued gag order on newspaper accounts the first day of trial until jury in co-conspirator's trial was selected and sequestered on grounds that news accounts might prejudice the co-conspirator's right to obtain an impartial jury. Prosecutor and defense counsel supported the order. Order also barred news accounts of the gag order itself and barred a specific reporter from the Birmingham Post- Herald from attending the other murder trial.

July 27, 1979: Birmingham Post-Herald printed story on trial account.

August 1, 1979: Post-Herald and its reporter ordered to show cause why they should not be held in contempt.

August 7, 1979: Reporter held in contempt of court and sentenced to three days in jail. Reporter and editor fined $100 each. Sentence and fine stayed for appeal. Post-Herald and its reporter appealed.

August 8, 1979: Appeal pending before Alabama Supreme Court.

State v. Giles, No. CC79-090,091 (Ala. Cir. Ct., Blount County July 26, 1979).

ILLINOIS PRETRIAL PROCEEDINGS CLOSED

28. July 27, 1979: Mount Carroll, Illinois; Carroll County Circuit Court; Murder case: Pretrial proceeding to suppress evidence.

Defense counsel made motion to seal pretrial proceedings to the public and press on grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution took no position. Press verbally opposed the motion.

Judge ordered proceeding closed citing Gannett.

State v. Nichols, No. 79CF22 (Ill. Cir. Ct., Carroll County July 28, 1979).

ALBANY PRETRIAL BURGLARY PROCEEDINGS KEPT OPEN

29. July 30, 1979: Albany, New York; Albany County Court; Burglary case: Pretrial proceeding to suppress incriminating statement.

Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor opposed the motion.

Judge denied motion to seal the proceeding on grounds that there had been insufficient publicity to justify a closed proceeding.

People v. Webb, No. 399-79 (N.Y., Albany County July 30, 1979).

NEBRASKA RAPE CASE PRETRIAL PROCEEDINGS CLOSED

30. July 31, 1979: Kearney, Nebraska; Buffalo County District Court; rape case: Pretrial proceeding to suppress evidence.

Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts would be embarrassing to the victim. Prosecutor apparently took no position. Kearney Hub and broadcast media verbally opposed the motion.

Judge ordered proceeding sealed.

State v. Earlgewecke, No. 5861 (Neb. Dist. Ct., Buffalo County July 31, 1979).

MASSACHUSETTS KIDNAP-MURDER PROCEEDING SEALED

31. July 20, 1979: New Bedford, Massachusetts; Bristol County Superior Court; Kidnap-murder case: Pretrial proceeding to suppress confession.

Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor joined in the motion. Press apparently did not object.

Judge ordered proceeding sealed, citing Gannett.

Commonwealth v. Silva, Nos. 4000 and 4001 (Mass. Superior Court, Bristol County July 20, 1979).

FEDERAL COURT TO DECIDE BRIBERY TRIAL SECRECY

32. August 2, 1979: Nashville, Tennessee; U.S. District Court; Prison pardon bribery: Trial

Defense counsel for one of five co-defendants, former aides to former Governor Ray Blanton and two others, made motion to seal trial from the public and the press on the grounds that the unsequestered jury had seen news accounts of a hearing on evidence for which the jury was not present. One co-defendant joined the motion. Prosecutor did not oppose the motion. The Nashville Tennessean, Sigma Delta Chi, and two television stations opposed the motion.

August 6, 1979: Motion pending before U.S. District Court.

U.S. v. Benson, No 79-30054 (M.D. Tenn. August 2, 1979).

GROUP MURDER PRETRIAL PROCEEDINGS CLOSED

33. July 30, 1979: Papillion, Nebraska; Sarpy County District Court; First-degree murder case involving seven defendants: Pretrial hearing on the indictment.

    Defense counsel made motion to seal pretrial proceedings on the grounds that news accounts would prejudice the defendants' right to obtain an impartial jury. Prosecutor took no position. Omaha World Herald and other press groups opposed.

    Judge sealed the proceedings, citing Gannett.

    State v. Leander, (Neb. Dist. Ct., Sarpy County July 30, 1979).

SCHOOL OFFICIAL EMBEZZLEMENT CASE SEALED

34. July 31, 1979: Aurora, Nebraska; Hamilton County Court; School superintendent embezzlement case: Pretrial proceeding to suppress evidence.

    Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor did not oppose the motion.

    Judge ordered proceeding sealed.

State v. Zichek, No. 12266-22 (Neb. Cnty. Ct., Hamilton County July 31, 1979).

OHIO MURDER-KIDNAP CASE SEALED

35. August 2, 1979: Jefferson, Ohio; Ashtabula County Court of Common Pleas; Kidnap-murder case: Pretrial proceeding to suppress evidence.

    Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor did not oppose the motion. The president of The Jefferson Gazette protested the motion in a letter to the judge.

    The Judge ordered the proceeding sealed.

    State v. Aldridge, Nos. 10241, 10242 (Ohio Court of Common Pleas, Ashtabula County August 2, 1979).

OKLAHOMA MURDER PRETRIAL CLOSURE MOTION WITHDRAWN

36. July 27, 1979: Oklahoma City, Oklahoma; Oklahoma County District Court; First degree murder case: Pretrial proceeding to suppress evidence.

    Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution opposed the motion. The Daily Oklahoman opposed the motion.

July 30, 1979: Defense counsel withdrew motion to seal proceeding after prosecution said it would not introduce certain evidence.

State v. Cochran, CRF 79-2376 (Okla. Dist. Ct., Oklahoma County July 27, 1979).

MAINE ATTEMPT TO CLOSE MURDER PROCEEDINGS DENIED

37. July 27, 1979: Ellsworth, Maine; Hancock County Superior Court; Murder case: Pretrial proceeding to suppress evidence.

Defense counsel made motion to seal pretrial proceeding from the press and the public on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution opposed the motion. The Ellsworth-American opposed the motion.

The judge denied the motion to seal the proceedings.

State v. Grindele, No. CR-79-51 (Maine Super. Ct., Hancock County July 27, 1979).

IOWA JUDGE TO DECIDE COUNTERFEITING PRETRIAL SECRECY

38. July 25, 1979: Des Moines, Iowa; U.S. District Court; Counterfeiting case: Pretrial motion to close trial.

Defense counsel made motion to close trial from the press and the public on the grounds that news accounts of entrapment defense involving the defendant's past activities as a police informant, might endanger the defendant's safety. The prosecution and The Des Moines Register opposed the motion.

August 6, 1979: Motion to close trial pending.

U.S. v. Powers, No. 79-26 (S.D. Iowa July 25, 1979).

OKLAHOMA MURDER PRETRIAL CLOSURE REJECTED

39. July 26, 1979: Oklahoma City, Oklahoma; Oklahoma County District Court; First degree murder case: Pretrial proceeding to suppress evidence.

Defense counsel for one of four co-defendants made motion to seal pretrial proceeding on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecution and The Daily Oklahoman opposed the motion.

Judge denied the motion.

State V. McIntire, No. CRF 79-2282 (Okla. Dist. Ct., Oklahoma County July 26, 1979).

NEBRASKA MURDER CASE PRETRIAL HEARING OPEN

40. August 13, 1979: North Platte, Nebraska; Lincoln County District Court; Murder case: Pretrial proceeding to suppress confession.

    Defense counsel made motion to seal pretrial proceeding to public and press on the grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor agreed to closure request.

    Judge denied the motion to seal proceeding on grounds that the confession was already public record and there was therefore no reason to close the hearing.

    State v. Simants, No. B 2904 (Neb. Dist. Ct., Lincoln County August 13, 1979).

NORTH CAROLINA KIDNAP AND RAPE TRIAL CLOSED

41. July 12, 1979: Charlotte, North Carolina; Mecklenburg County Superior Court; Kidnapping and rape case: Trial.

    Prosecutor made motion to close trial to press and public during testimony of alleged rape victim on grounds that public testimony would be embarrassing to witness. Defense counsel did not oppose the motion. Press apparently did not oppose.

    Judge ordered trial closed during witness' testimony.

    State v. Lynch, No. 79 CRS 7594 (N.C. Super. Ct., Mecklenburg County July 12, 1979).

FEDERAL COURT RAPE TRIAL KEPT OPEN

42. August 14, 1979: Charleston, West Virginia; U.S. District Court; Rape case: Trial.

    Defense made motion to close portions of trial to press but not public, or to gag press on grounds that the unsequestered jury might see news accounts of hearings on evidence at which jury would not be present. Prosecutor objected. Associated Press, Charleston Daily Mail and Charleston Gazette opposed motion.

    Judge denied closure and gag motions.

    U.S. v. Barber, No. 79-20038 (S.D.W.Va. August 16, 1979).

HAWAII ATTEMPTED MURDER PRETRIAL HEARING KEPT OPEN

43. July 18, 1979: Honolulu, Hawaii; Circuit Court of the First Circuit: Attempted murder case: Pretrial proceeding to suppress evidence.

    Defense counsel made motion to seal pretrial proceeding from the press and the public on grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor did not object. Honolulu Star-Bulletin, Honolulu Advertiser and KGMB-TV objected to the motion

    Judge said the media had no standing to contest the motion.

    Judge denied closure motion on grounds that defense attorney had not shown exceptional circumstances which justified closure.
    State v. Bryant, No. 52574 (Hawaii Cir. Ct. Honolulu July 18, 1979).

NEW YORK PRETRIAL MURDER PROCEEDING KEPT OPEN

44. August 8, 1979: Riverhead, New York; New York State Supreme Court; Murder case: Pretrial proceeding to suppress statement.

Defense counsel made motion to seal pretrial proceeding from the press and the public on grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor did not oppose the motion.

Judge ordered proceeding closed citing Gannett. Newsday then opposed the closure.

August 15, 1979; Judge reversed himself and ordered that proceeding be opened. Defense counsel said he would appeal.

People v. Briggs, No. 178-79 (New York Sup. Ct., Suffolk County August 15, 1979).

MICHIGAN MURDER PRETRIAL PROCEEDING KEPT OPEN

45. July 2, 1979; Grand Rapids, Michigan; Kent County Circuit Court; Murder case: Pretrial proceeding on evidence.

Defense counsel made motion to seal pretrial proceeding on grounds that news accounts might prejudice the defendant's right to obtain an impartial jury. Prosecutor and Grand Rapids Press opposed the motion.

Judge denied the motion.

State v. Lee, No. 79-24278FY, (Mich. Dist. Ct., Kent County July 2, 1979).

HAWAII RAPE PRETRIAL PROCEEDING CLOSED: TRIAL KEPT OPEN

46. July 23, 1979; Honolulu, Hawaii; Circuit Court; rape case: Pretrial proceeding on motion to close trial.

Defense counsel made motion to seal pretrial proceeding concerning motion to close trial to press and public on grounds that news accounts of trial would be embarrassing to the defendant. Prosecutor opposed the motion to close the trial, but not the sealed pre-trial hearing to decide the motion. Honolulu Star-Bulletin opposed both motions.

Judge granted the motion to seal the pretrial hearing, but, during the sealed proceeding, denied the motion to close the trial. Judge also ruled that the press had no standing to object to the closed trial motion in the pretrial proceeding. Judge made transcript of sealed hearing available to the press and the public.

State v. Lima, Cr. No. 52998 (Hawaii Cir. Ct., Honolulu July 23, 1979).

CALIFORNIA MURDER PRETRIAL PROCEEDING CLOSED AND TRANSCRIPT SEALED

47. July 18, 1979: Napa, California; Napa County Municipal Court; Murder case: Pretrial proceeding.

Defense counsel made motion to seal pretrial proceeding to press and public, citing California Penal Code 868 requiring closed pretrial proceedings merely upon the motion of the defense. Prosecution did not oppose.

Press verbally objected.

Judge closed proceeding. Journalism professor reportedly asked for a copy of the transcript of that portion of the proceeding concerning the closure motion, but was told the judge had ordered the transcript sealed.

August 14, 1979: Professor may appeal to obtain transcript.

People v. Maluenda, No. 4933 (Calif. Mun. Ct., Napa County July 18, 1979).

WISCONSIN MURDER PRETRIAL OPEN TO PUBLIC BUT CLOSED TO PRESS (EXCEPT IF PRESS AGREES TO SUPPRESS NEWS OF TESTIMONY)

48. August 7, 1979: Antigo, Wisconsin; Langlade County Circuit Court; Murder case: Pretrial motion proceeding.

Prosecutor and defense counsel made motion to seal pretrial proceedings from the press and the public until jury chosen on grounds that news accounts might prejudice the defendant's right to obtain an impartial jury.

Judge denied the motion but before the proceeding met with reporters and ordered them not to publish news about confessions, some physical evidence, and release on bail. Judge said anyone violating the guidelines would be barred from subsequent proceedings. Some reporters voiced objections, but all agreed.

State v. Stawicki, No. 38-138 (Wisc. Cir. Ct., Langlade County August 7, 1979).

OAKLAND PRETRIAL MURDER PROCEEDING CLOSED

49. August 16, 1979: Oakland, California; Oakland Municipal Court; Multiple murder case: Pretrial hearing on sufficiency of evidence to bind defendant for trial.

Defense counsel made motion to seal pretrial proceeding under California closure law. Prosecutor and press opposed the motion. Opposition filed by Oakland Tribune.

Judge ordered proceeding closed, saying he was bound by the state closure law.

People v. Hughes, No. 153556 (Cal.,Oakland Municipal Court, Alameda County, August 16, 1979).

OREGON PRETRIAL CLOSURE REJECTED IN ATTEMPTED ASSAULT CASE

50. August 8, 1979: Dallas, Oregon; Polk County District Court; Attempted assault and menacing case: Pretrial hearing on sufficiency of evidence to bind defendant for trial.

Citing Gannett, defense counsel made motion to seal pretrial proceeding on the ground that news accounts would prejudice the defendant's right to obtain an impartial jury. Prosecutor opposed the motion. Representative of local weekly newspaper present in court but did not oppose.

Judge denied the motion.

State v. Graham No. CR 79-636 (Ore., Polk County District Court, August 10, 1979).

U.S. DISTRICT COURT POST-CONVICTION SENTENCING HEARING CLOSED

51. July 31, 1979: New York City, New York; U.S. District Court; Union bribery case: Sentencing hearing.

Defense counsel made motion to seal post-trial sentencing hearing on ground that if publicized, evidence presented at hearing might prejudice potential jurors in defendant's upcoming trial on racketeering charges. Prosecution opposed the closure.

Judge closed the hearing.

U.S. v. Held, No. 79CR222 (S.D. New York, July 31, 1979).

Supreme Court, U. S.
FILED
SEP 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN MCCARTHY,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN MCCARTHY,

Appellants,

v.

RICHARD H. C. TAYLOR,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

AND

AMERICAN SOCIETY OF NEWSPAPER EDITORS IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS IN SUPPORT OF JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") submit this brief *amici curiae* in support of Appellants Richmond Newspapers, Inc., et al. All parties to this suit have given ANPA and ASNE written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS ANPA

The ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,340 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

ANPA continually seeks to help maintain our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open..." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "The newspapers, magazines and other journals of the country...shed more light on the public and business affairs of the nation than any other instrumentality of publicity..." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1935), and "[t]he Constitution specifically selected the press...to play [this] important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). For "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

In their efforts to preserve an untrammeled press under our republican form of democracy as a primary source in our society of newsworthy information and comment, your amici ANPA and ASNE have in the recent past addressed this court in other important cases involving the right of the press to present for public debate information concerning the operations of our judicial system and other activities of government. Some of these are:

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

Oklahoma Pub. Co. v. District Court of Oklahoma County, 430 U.S. 308 (1977).

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

Herbert v. Lando, ____U.S.____, 60 L.Ed.2d 115 (1979).

Smith v. State, ex rel. Daily Mail Publishing Co., et al. ____U.S.____, 99 S.Ct. 2667 (1979).

Gannett v. DePasquale, ____U.S.____, 61 L.Ed.2d 608 (1979).

ASNE only:

Hutchinson v. Proxmire, ____U.S.____, 99 S.Ct. 2675 (1979).

Wolston v. Reader's Digest, ____U.S.____, 99 S.Ct. 2701 (1979).

In light of the constitutionally prescribed role of our free press in presenting for public debate matters of official concern, and the fact that "[t]he operations of the courts and the conduct of judges are matters of utmost public concern," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) your amici are alarmed that a senior state court has determined that this Court's holding

in *DePasquale, supra*, has led to a conclusion that criminal trials can be held in secret. Your amici strongly dispute the Supreme Court of Virginia's resolution of the constitutional values involved. Read at best, the majority opinion in *DePasquale, supra*, must be regarded, as Chief Justice Burger regarded it, as stating that it applied only to the pretrial conditions availing in that case. *DePasquale, supra*, does not extend the Court's teaching to trials. The Supreme Court of Virginia's reliance on the case for that teaching is clearly erroneous and, should it be permitted to stand, would lead federal and state trial courts to routinely disregard their judicial responsibility to safeguard the constitutional rights of the citizenry under the First, Sixth, Ninth and Fourteenth Amendments.

INTEREST OF THE AMICUS ASNE

The ASNE is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of the "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people. The ASNE adopts the legal principles in ANPA's opening statement.

STATEMENT OF THE CASE AND CONSTITUTIONAL PROVISIONS INVOLVED

Your amici adopt the statement of the case as set forth in the Jurisdictional Statement filed by Richmond Newspapers, Inc. Your amici submit, however, that in

addition to the constitutional provisions of the First, Sixth and Fourteenth Amendments, cited by Appellants herein, this case involves the Ninth Amendment, which provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

SUMMARY OF ARGUMENT

PREAMBLE

This court is here offered the rare opportunity of an early review of the drastic effects brought about by its decision rendered on the last decision day of term, July 2, 1979.[1]

We would urge upon the Court that in light of the fact that as of August 23rd 1979 there have been more than fifty closures of judicial proceedings in the form of pretrials, trials or sentencings, that the Court should summarily reverse the Supreme Court of Virginia's reliance on *Gannett v. DePasquale, supra*. This would be in keeping with the views of the minority in that case and in keeping with the views of Justice Stevens, joined by Justices Brennan and Powell in dissent in *Houchins v. KQED, Inc.* 438 U.S.1 (1978), where Justice Stevens said: "By express command of the Sixth Amendment the proceeding must be a 'public trial.' It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding." *Id.* at 36-37.

Not only should this Court summarily reverse the Supreme Court of Virginia but we most respectfully urge the Court to review its holding in *DePasquale, supra*. We

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[1] This Court is still in session. For the first time in history the Chief Justice did not adjourn until the next term.

would hope to persuade the Court that in our Republic no judicial proceeding should ever be closed to the public and concurrently to the press except in the rarest of cases and then under guidelines spelled out by this Court.

The very fabric of our Republic hangs on the immemorial right of judicial proceedings being open to the public. Where did this principle originate? As in all efforts to achieve an understanding of evolving social concepts, we turn to history.

Mankind has sought since earliest recorded times to cast the light of publicity on the functioning of its governmental bodies irrespective of whether it related to a legislative, executive or judicial branch of government, in whatever form. The first reference to this social phenomenon found by your amici, dating back to the fifteenth century B.C., is:

> Lo, whenever an administrator hears cases let there be publicity and let water and air report all that he may do. Lo, then his conduct is by no means unperceived. If he does anything (unseemly) and he is to blame he is not to be reinstalled on the authority of an acting official but men shall learn of it on the authority of his (proper) judge. . .[2]

Turning to our own legal heritage, the following from H. CROSS, THE PEOPLE'S RIGHT TO KNOW, (1953) accurately reflects our Common Law history:

> *I have something to say to the court about the first fundamental liberty of an Englishman in order to his trial; which is that by the laws of this land all courts of justice ought to be free and open for all sorts of peaceable people to see, behold, and hear,*

[2] From the tomb of Rekhmire, Vizer to Tuthmosis III, King of Egypt, XVIII dynasty (1580-1321 B.C.).

> *and have free access unto...and yet, Sir, as I came in, I found the gates shut and guarded, which is contrary to law and justice.*

Thus, in 1649, charged with high treason, spoke John Lilburne. Such was the law of England, and his request was granted. While he was the first to "make the news" in a reported case, the practice of having trials open to the public was already of long standing in the common law.

Both Hale and Blackstone state that evidence is presented in open court in the presence of all bystanders. "Bishop, in his work on the criminal law, asserts that 'from immemorial usage wherever the common law prevails, all trials are in open court to which spectators are admitted.' The origin of the practice is more obscure than evidence of its ancient existence. Yet origin may have some bearing on the question whether the right belongs to the accused alone (in which event he might waive it and thus, with the prosecution's acquiescence, close the trial) or whether it may be claimed in behalf of the public by a representative thereof.

The United States Supreme Court has said that the traditional Anglo-Saxon distrust of secret trials has been variously ascribed to the notorious use thereof by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French Monarchy's abuse of the *lettre de cachet*. Inquisition, Star Chamber, and *lettre de cachet* symbolized a menace to liberty; each had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of the accused to a fair trial.

Despite the modern usage of the term "Star Chamber" to designate secret legislative, judicial, or official proceedings, it seems likely that in actual fact in many, if not most, instances the trials in the English tribunal of that name were conducted in public, and that its unpopularity was due, not to secrecy but to use of torture in obtaining confessions, to fines and penalties which were so excessive as to be in reality oppressive royal revenue measures, and to frequent disregard of the ordinary rules of law. News had been printed in England for only some eighteen years when Star Chamber was abolished by the Long Parliament. The rather widespread public knowledge of Star Chamber proceedings indicates that people were attending its sessions.

But whatever its origin the common law concept of a public trial had come to be regarded (at the time of the adoption of the Sixth Amendment) as an essential guarantee against attempts to employ the courts as instruments of persecution. The knowledge that every criminal trial was subject to contemporaneous review in the forum of public opinion was regarded as an effective restraint on possible abuse of judicial power. It was also thought that if trials were public important witnesses unknown to the parties might thus be informed of developments and voluntarily come forward to testify, and spectators might learn enough about the administration of the law to acquire confidence in seeking judicial remedies for their own real or fancied wrongs.[3]

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[3] H. CROSS, THE PEOPLE'S RIGHT TO KNOW, LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS, (1953).

We would remind the Court that nowhere in the world are people free without a free press and a free judiciary, each able to operate under rules of law guiding both. The history of Nazi Germany reminds us that the first right of the Weimar Republic's people which Hitler destroyed was that of press freedom. And, shortly after the destruction of a free press in Germany, that Republic's independent judicial system also was subverted and destroyed by appointment of Hilter supporters to the bench.

Who can forget the demise of *La Prensa* and the free press of Argentina concurrent with the rise of Juan Peron? And, again in that Republic, the subsequent destruction of the judicial system left protest impossible.

Our memories would be short indeed, if we did not sadly note how India, once looked upon as a progressing Asian democracy, first censored and gagged its press and then cowed its judiciary into upholding the government excesses perpetrated by Indira Ghandi.

In today's lexicon who can forget the destruction of the prosecutorial and judicial branches of the Chinese government in 1964 and 1965? What free judiciary and free press do you believe exist in Cambodia and Viet Nam today?

It can be truly said that absent the "Fourth Estate" the Executive Branch of Government, in the form of dictatorship of whatever kind, inevitably overwhelms both the judicial and legislative branches in whatever form they may be created in a given country.

Stated another way, without the public's free participation with full knowledge, the governing process becomes one of invariable dictatorship and oppression.

Under our republican form of democracy our forebearers created the First Amendment to provide for our

people a means to assist them in casting light and publicity on all branches of government. As a result, our country has become the envy of the world as being a country of true freedom of expression.

Now to the problem at hand as it derives from our United States' constitutional experience.

Your amici summarize their argument as follows:

I

The Commonwealth of Virginia adopted protection of the right of free speech and press well before the adoption of same in the Constitution of the United States. This protection sounded in the struggle during Colonial times which eventuated in the Revolutionary War and brought about a realization on the part of the revolutionary statesmen such as Jefferson, Madison, Bushrod Washington, Adams, Hancock, Mason and others, that contrary to the unwritten Constitution of the Mother Country, in order to ensure the rights of the people of the aborning country, some basic philosophies would have to be placed in specific language in a written constitution for all under a republican form of democracy. In reaching these conclusions, it is clear from the early writings that one right upon which there existed no doubt was that, in the tradition of England, open trials went back to the Middle Ages. At one time they were the primary social event of villages and towns in England, Scotland, Wales and Ireland. It is clear that there was never any doubt in the minds of our constitutional forebearers that the right of open trial was a right so clearly preserved to the people that it need not be spelled out in the Constitution; as will be shown later, it was one of those immemorial basic rights which are guaranteed under the Ninth Amendment. The rights of free press, speech, religion, freedom of assembly and the

right to petition were considered necessary to be preserved in writing in light of the conflict in the British Parliament which continued up to 1855.[4]

It should be noted that the states refused to adopt the Constitution unless a Bill of Rights was adopted. It is interesting to note that James Madison's proposals in the House of Representatives in the First Congress of the United States under our present form of government, used the language "the powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively." This was part of Proposal Seventh as the proposal went from Madison to the House Committee. The House Committee, charged with draftsmanship, proposed Proposal Ninth which read, "the powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively." Then the House, reviewing these proposals from Madison and the Committee, and after full debate, sent to the Senate Article XV which read, "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others, retained by the people." In doing so, it recognized the immemorial rights of the people.

When the Senate of the United States sent twelve proposed amendments to the people for ratification, Article the Eleventh read, "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." It also is interesting to note that the House of Representatives sent to the Senate an Article XIV: "no state shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor freedom of speech, or of the press." When these proposals were sent from the Senate to the states, freedom of religion, speech and press, the right of the

[4] Appendix "A" to Report of American Newspaper Publishers Association on Free Press and Fair Trial, page 18.

people to peaceably assemble and to petition the government for a redress of grievances were placed in Article the Third and the right of an accused to enjoy a speedy and public trial was placed under Article the Eighth. Since the people refused to ratify Article the First and Article the Second, Article the Third became the First Amendment and Article the Eighth became the Sixth Amendment.[5]

The foregoing clearly illustrates that the First Congress recognized fully the difference between immemorial rights reserved to the people, such as the right to attend open trials, as contrasted to those rights which because of their recent historical experience the constitutional drafters felt must be spelled out.

II

In concluding this summary of argument your amici most respectfully call to the Court's attention the American Bar Association Standards Relating To The Administration Of Criminal Justice, second edition tentative draft *Fair Trial and Free Press*, adopted by the House of Delegates of the American Bar Association without dissent on August the Ninth, 1978, and specifically call the Court's attention to Standard 8-3.2, "Pretrial proceedings: exclusion of public and sealing of records." This Standard was adopted after eleven years of study and controversy caused by the Reardon Report which had been adopted by the American Bar Association in 1967. The predecessor to Standard 8-3.2 had caused great confusion in the courts of the country, just as the decision in *DePasquale, supra*, already has caused similar confusion in courts throughout the country. It is particularly notable

[5] Appendix "A" to Report of American Newspaper Publishers Association on Free Press and Fair Trial.

that in the Commentary accompanying this Standard this language follows: "Although this standard deals only with pretrial proceedings, the general principle extends to every phase of judicial proceedings in a criminal case."

ARGUMENT

In the instant case, the Supreme Court of Virginia summarily dismissed appellants' petitions for writ of mandamus and writ of prohibition and refused appellants' petition for appeal, without opinion, merely citing this Court's recent decision in *Gannett Co., Inc. v. DePasquale, supra*. In so doing the Supreme Court of Virginia sanctioned the closing of entire criminal trials. Yet, despite the confusion which has been caused by the majority opinion in *DePasquale*, it is clear that at least seven members of this Court are of the opinion that criminal trials *must* be public in the absence of extraordinary circumstances mandating the imposition of reasonable restrictions to safequard the rights of the defendant and the public alike.

Justices Blackmun, Brennan, White and Marshall, dissenting in *DePasquale*, stated that no part of any criminal proceedings should be closed "unless a defendant carries his burden to demonstrate a strict and inescapable necessity for closure." *Id.* at 661. Chief Justice Burger filed a separate concurring opinion in *DePasquale* to emphasize his view that the majority opinion was applicable only to pretrial proceedings. Finally, although Justices Stevens and Powell joined the majority opinion in *DePasquale*, both had unequivocally stated that the Sixth Amendment prohibits closed trials, as recently as the last term. Justice Stevens, joined in dissent by Justices Brennan and Powell in *Houchins v. KQED, Inc., supra*, wrote:

> [A] trial. . .must conform to the dictates of the Constitution. By express command of the Sixth

> Amendment the proceeding must be a "public trial." It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding.

Id. at 36-37 (footnotes omitted).

Given the stated positions of these seven members of the Court, it is inconceivable that they would permit to stand the closing of an entire criminal proceeding on the sole basis of the defendant's complaint that: "I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what." Jurisdictional Statement, App.D at 7a. If, indeed, a criminal trial ever may be closed in its entirety to the public, such a basis for closure falls far short of meeting the *Standards Relating to Fair Trial and Free Press* approved by the American Bar Association House of Delegates[6] and fails entirely to comport with the guarantees of the First, Sixth, Ninth and Fourteenth Amendments.

Nevertheless, the very fact that the Supreme Court of Virginia has sanctioned a closing on such grounds demonstrates the confusion which has arisen as a result of this Court's decision in *DePasquale*. As has been noted previously, the massive misinterpretations emanating from the *DePasquale* decision have resulted in more than 50 closings of judicial proceedings (pretrial, trial and post-trial). Your amici respectfully urge this Court not only to summarily reverse the decision of the Supreme Court of Virginia, but also to grasp this early opportunity to review the decision rendered in *Gannett v. DePasquale, supra*. The following arguments are submitted in an effort to aid the Court in considering the constitutional guarantees which must be examined and balanced where the rights of defendants and the public to open judicial proceedings come into conflict.

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[6] See Appendix A

I

A CONDITIONAL RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS LIES IN THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

An essential protection against arbitrary and oppressive exercise of the powers delegated to our federal and state governments lies in the First Amendment freedoms of speech and press. The freedom of speech permits the unfettered communication of political grievances. In addition, it forecloses governmental control or manipulation of the sentiments uttered by and to the public and, by protecting our right to full information concerning the doings or misdoings of governmental officials and institutions, whether they be judicial, legislative or executive, it guards against the maladministration of government. Thus, the right of the public to speak and the press to publish is unfulfilled without a correlative public right to receive information. See generally, Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q., 6-7 (1976); Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977). This Court has recognized this right on several occasions. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), this Court struck down a city ordinance prohibiting the posting of real estate "For Sale" or "Sold" signs, based on both the speaker's right to communicate and the listener's "First Amendment interest in the subject matter of the speech." *Id.* at 92; see also *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976). The case of *Procunier v. Martinez*, 416 U.S. 396 (1974) recognized a right to receive personal correspondence. In *Thomas v. Collins*, 323 U.S. 516 (1945) this Court held that both "a labor organizer's right to speak and the right of workers 'to hear what he had to say,'...were abridged by a state

law requiring organizers to register before soliciting union membership." *Kleindienst v. Mandel*, 408 U.S. 753 at 763 (1972), citing *Thomas v. Collins, supra*, at 534.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court noted that "[It] is now well established that the Constitution protects the right to receive informational ideas... This right to receive informational ideas ... is fundamental to our free society." *Id.* at 564. And in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), the Court referred to a right to receive information as falling within the penumbra of the First Amendment freedoms of speech and press.

Your amici submit that the First Amendment was intended to protect both free and *informed* discussion of governmental affairs and that the flow to the public of information on the conduct of judicial proceedings necessarily is encompassed within the protections of the First Amendment.[7]

Over thirty years ago, this Court held: "A trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). This principle is more than simply an observation that criminal defendants generally elect to exercise their Sixth Amendment right to public trial; rather, it reflects the belief that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern," *Landmark*

[7] Information gathering is clearly entitled to variable degrees of constitutional protection. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Pell v. Procunier, 417 U.S. 817, 833 (1974). This protection necessarily complements that protection accorded the public under the First Amendment to receive information and ideas. See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 756 (1976); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266-270 (1964); Stanley v. Georgia, 394 U.S. 557 (1969).

Communications, Inc. v. Virginia, 435 U.S. 829 (1978), which therefore must be open to public scrutiny and comment. Your amici respectfully submit that cases such as *Craig v. Harney, supra*, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976), and *Oklahoma Publishing Company v. District Court of Oklahoma County*, 430 U.S. 308 (1977) cannot be construed to rest solely on the narrow ground that the First Amendment prohibits prior restraints on publication. They reflect the common understanding that open judicial proceedings protect the public's right to know and preserve "the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. 358, 364 (1970). Thus, open criminal proceedings, which make possible contemporaneous public scrutiny and comment on our judicial system, "are of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

At the same time, public attendance at criminal trials and the publicity and debate they generate promote that fair treatment which the Sixth Amendment public trial guarantee is designed to provide. "[J]ustice cannot survive behind walls of silence," and "[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. The press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 349, 350 (1966); see also, *Cox Broadcasting Corp. v. Cohn, supra* at 492 (1975). This Court in *In Re Oliver*, 333 U.S. 257, 271 (1948) quoted Jeremy Bentham as follows:

> ... suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be

> at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all of the checks are insufficient: in comparision of publicity, all other checks are of small account.

in holding, *inter alia*, that secret proceedings were violative of the Fourteenth Amendment.

> One contemporary commentator has argued that:
>
> > recognizing a[n] [independent] right of attendance [at criminal judicial proceedings] would actually promote the protective policies of the Sixth Amendment. Individual defendants are given the right of public trial on the theory that their enforcement of the right will preserve the norm of openness and thus achieve the goal of fairness. Ultimately, the goal is fairness for *all* defendants, and its attainment depends upon public awareness, discussion, and criticism of the criminal process. Public scrutiny of criminal prosecutions, and especially of pretrial proceedings, preserves and enhances the quality of criminal justice.
>
> Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1325. (1978) (Footnotes omitted)

Thus, although neither the First Amendment nor the Sixth Amendment alone *explicitly* provide an independent right of the public to attend criminal judicial proceedings, a constitutional basis for a penumbral right of attendance arises nonetheless from the interplay of these two constitutional texts. Attendance at criminal judicial proceedings promotes the protective policy of the First and Sixth Amendments by subjecting the judicial process to public scrutiny which both informs the people of the operations of their judiciary and, over the long term, secures judicial accountability and fairness for criminal defendants.

Therefore, to assure implementation of these dual, fundamental constitutional goals, this Court should recognize a qualified constitutional right on the part of the public and its representative, the news media, to attend criminal proceedings, and, insofar as not prohibited by lawful protective order, speak and publish on the events that transpire at such hearings.

This Court on previous occasions has upheld claims of constitutional rights which are not explicitly encompassed within the text of a single constitutional provision. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) (plurality opinion), the Court struck down a state statute which penalized the use by married couples of "any drug, medicinal article, or instrument for the purpose of preventing conception." The Court held that such a statute violated a constitutional right of privacy which is not found in the express terms of a constitutional amendment, but which emanates from the First, Third, Fourth, Fifth and Ninth Amendments, each of which has "a penumbra where privacy is protected from governmental intrusion." *Id.* at 483.[8] Justice Douglas, writing for the Court in *Griswold*, also discussed the penumbra surrounding the explicit terms of the First Amendment:

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[8] "The . . . cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' " *Id.* at 484.

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parent's choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> * * * *
>
> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. *Without those peripheral rights, the specific rights would be less secure.* (citations omitted) (emphasis added).

Id. at 482

Thus, in assessing the existence or nonexistence of a constitutional right, this Court is not limited to strict statutory construction of the explicit guarantees found in one or more constitutional amendments. It may focus "on the nature of the activity at issue and the extent to which the allowance—or encouragement—of that activity is necessary to achieve the goals of separate texts. Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1327 (1978).

Griswold cites two other cases where this functional analytical approach was taken in recognizing a non-explicit constitutional right. In *NAACP v. Alabama*, 357 U.S. 449 (1958) this Court looked at the activity involved—the anonymous association with others for the purpose of promoting a political cause—and found that it

was not expressly protected under the terms of either the free speech clause or the free assembly clause of the First Amendment. Nonetheless, the Court found that such activity promoted the fundamental purposes of each clause, while denial of constitutional protection over such activity would undermine those purposes. As a result, the Court found "in the close nexus between the freedoms of speech and assembly," a constitutional right of association.

In *Boyd v. United States*, 116 U.S. 616 (1886), a constitutional challenge was raised to a state statute which authorized the compulsory production by citizens of their personal records for use as physical evidence against their owner. The Court found that the statute was not invalidated under a literal interpretation of the Fourth Amendment prohibition on "unreasonable searches and seizures" or the Fifth Amendment prohibition on compelling a person "to be a witness against himself." The Court found that in protecting individual privacy and security, the Fourth and Fifth Amendments "run almost into one another."

> a close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.[9]

Id. at 635.

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[9] The need for an analysis which goes beyond the express terms of the Bill of Rights and confers protection on those personal rights necessary to give meaningful effect to the express guarantees was adverted to by Justice Brennan in Lamont v. Postmaster General, 381 U.S. 301 (1965):

> "[T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from abridgement those equally fundamental personal rights necessary to make the express guarantee fully meaningful." *Id.* at 308 (Brennan, J., concurring).

Thus, where two disparate constitutional provisions may reinforce one another to a significant degree, they may be considered, in combination, to sustain a constitutional right which effectuates their policies but which cannot be found in the express language of either provision. There being no dispute that public criminal proceedings promote fair treatment before the courts of this country, through judicial accountability and "public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978), a defendant's election to close presumptively open judicial proceedings may be subjected to constitutional limitation and, as Justice Powell has stated in *Gannett v. DePasquale*, U.S. , 61 L.Ed.2d 608, 632 (1979), closure must not be permitted unless the public's First and Sixth Amendments rights to attend are balanced against a compelling state interest in closure.

II

THE IMMEMORIAL TRADITION OF OPEN JUDICIAL PROCEEDINGS IS A FUNDAMENTAL RIGHT RETAINED BY THE PEOPLE UNDER THE NINTH AMENDMENT

As historial analysis clearly shows, the common law right of the people to attend judicial proceedings is fundamental and deeply rooted in our common law traditions. See *Gannett v. DePasquale, supra* at 624-26, 646-54; *In Re Oliver*, 333 U.S. 257, 266 (1948). From ancient times in England, through the periods of Anglo-Saxon rule, Norman conquest and the rebellion of the Royal colonies in America, there was an unbroken tradition of open judicial proceedings in criminal cases. Trials were conducted "openlie in the presence of Judges, the Justices, the

enquest, the prisoner, and so manie as well or can come so neare as to heare it,. . .that all men may heare from the mouth of the depositors and witnesses what is said." *Gannett v. DePasquale, supra* at 647 (Blackmun, J., dissenting) quoting T. Smith, De Republica Anglorum (Alston ed. 1972).

Although Justice Stewart in *Gannett v. DePasquale, supra* at 622, n.9, cites several twentieth century commentators who regard enactment of the Sixth Amendment right of public trial as reflecting the evolution of a personal right, or at least primarily a personal right, of the accused, the English judicial system began requiring public trials at a time when that system had very little regard for the rights of the accused. See 31 N.Y.U.L. REV. 611 (1956); 6 WIGMORE, EVIDENCE §1834 (J. Chadbourne rev. ed. 1976) and authorities cited therein. Criminal proceedings were uniformly held in public both long before and after criminal defendants were first accorded such protections as the right to counsel, jury trial, prior notice of the charges and the right to confrontation—protections subsequently incorporated into the United States Constitution and proposed by the First Congress to the legislatures of the several states for ratification in 1789. Thus, the concept that public proceedings may serve to protect criminal defendants from judicial overreaching arose subsequent to the public's independent right to open criminal proceedings.

A fundamental tenet of the common law, both in England and in America, is that trials are to be public occurrences. This right of the people to access to judicial proceedings is founded on the belief that courts are public instrumentalities and that their activities are a proper matter for public scrutiny. In 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND (6th ed. 1681), Lord Coke, commenting upon the words "*In curia domini regis*" as they

are used in the Statute of Marlebridge, 1267, 52 Hen. 3, c. 1, said:

> These words are of great importance, for all causes ought to be heard, ordered, and determined before the Judges of the Kings Courts openly in the Kings Courts, whither all persons may resort; and in no chambers or other private places.

Id. at 103-04.

This heritage of the common law has been evident in American jurisprudence from the earliest days of the colonies. Its first appearance in a public document may have been in the Charter of the Fundamental Laws of New Jersey, drafted in 1676, whose Chapter XXIII provided:

> That in all publick courts of justice for tryals of causes, civil or criminal any person or persons, inhabitants of the said Province, may freely come into, and attend said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner, being intended and resolved, by the help of the Lord, and by these our Concessions and Fundamentals, that all and every person and persons inhabiting the said Province shall, as far as in us lies, be free from oppression and slavery.

5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS, 1492-1908, at 3060.

This right of the people that the courts of justice shall be public was included in the Bills of Rights of many states

and territories. The most common phrase was: "That all courts shall be open."[10]

In 1789, the Congress enacted the Sixth and Ninth Amendments. The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In commenting on the argument raised by Alexander Hamilton and others, that a Bill of Rights was unnecessary or undesirable because the Federal Government was a government of delegated powers without authority in any event to intrude upon fundamental personal rights, Mr. Justice Story wrote:

> In regard ... [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis.... But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.

II STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1867 at 626-627 (5th ed. 1891).

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[10] Constitutions of Alabama 1819, Sec. 14, 1 Thorpe, p. 97; Colorado 1876, Art. II, Sec. 6, *Id.* p. 475; Connecticut 1818, Art. I, Sec. 12, *Id.* at 538; Delaware 1792, Art. 1, Sec. 9, *Id.* at 569; Florida 1838, Art. I, Sec. 9, 2 Thorpe at 665; Idaho 1889, Art. 1, Sec. 18, *Id.* at 920; Indiana 1816, Art. I, Sec. 11, *Id.* at 1058; Kansas 1855, Art. I, Sec. 16, *Id.* at 1181; Kentucky 1792, Art. XII, Sec. 13, 3 Thorpe at 1275; Nebraska 1867, Art. I, Sec. 9, 4 Thorpe at 2350; North Dakota 1889, Art. I, Sec. 22, 5 Thorpe at 2858; Ohio 1851, Art. I, Sec. 16, *Id.* at 2915; South Dakota 1889, Art. VI, Sec. 20, 6 Thorpe at 3371; Tennessee 1870, Art. I, Sec. 17, *Id.* at 3450; Wyoming 1899, Art. I, Sec. 8, 7 Thorpe at 4418.

James Madison, principal author of the Ninth Amendment, also rejected the argument "that those rights which were not singled out [in the Bill of Rights], were intended to be assigned into the hands of the General Government and were consequently insecure." *I Annals of Congress* 456 (Gales and Seaton ed. 1834).

In *Gannett v. DePasquale, supra*, this Court was not presented with, and therefore did not address, the argument that an immemorial right to attend judicial proceedings is reserved to the people under the Ninth Amendment. Justice Stewart based his decision upon analysis of the Sixth Amendment.[11] He interpreted the failure of the Congress to explicitly prescribe in the Sixth Amendment an independent public right of open proceedings as a decision to elevate the defendant's right to protection from a biased jury over and above the public's protection from secret proceedings. Yet, we respectfully submit that Justice Blackmun is correct in saying, "there is no indication that the First Congress, in proposing what became the Sixth Amendment, meant to depart from the common law practice" of open proceedings. *Gannett v. DePasquale, supra* at 651 (Blackmun, J., dissenting opinion). Although the historical debate between Justice Stewart (see 61 L.Ed.2d at 624-28) and Justice Blackmun (61 L.Ed.2d. at 646-55) points up the fact that history unfortunately sheds little clear light on the specific intention of the authors of the public trial guarantee, see generally F. HELLER, THE SIXTH AMENDMENT TO THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT (1951), your amici respectfully submit that the

[11] Justice Stewart declined to decide whether members of the press and public have a right of access to judicial pretrial proceedings under the First and Fourteenth Amendments because "even assuming *arguendo* that the First and Fourteenth Amendments may guarantee such access . . . this putative right was given all appropriate deference by the state *nisi prius* court in the present case." 61 L.Ed.2d. at 629.

public trial provision of the Sixth Amendment was not intended to protect defendants from press comment. Rather, it was intended to protect defendants and the public from abuse of judicial authority. See *In Re Oliver*, 333 U.S. 257, 268, 270-273 (1948) ("Contemporaneous review of criminal trials in the forum of public opinion constitutes an effective restraint on possible abuse of judicial process." *Id.* at 270); T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION, 647 (8th ed. 1977).

Another clause of the Sixth Amendment guarantees an accused a trial before an impartial jury. And there is no historical evidence to suggest that the framers contemplated the opposite of a public trial, guaranteed in one part of the Sixth Amendment, as a legitimate means of securing an impartial jury, which is guaranteed in another.

In discussing the intent of Congress in enacting the public trial, as opposed to fair trial, guarantee, Justice Story noted:

> In declaring that the accused shall enjoy the right to a speedy and public trial [the Sixth Amendment] does but follow out the established course of the common law in all trials for crimes. The trial is always public.

III STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 662 (1833).

State courts have subsequently recognized that the tradition of open proceedings reflects a fundamental right of the public as well as the accused. "In this country it is the first principle that the people have the right to know what is done in their courts," *In Re Shortridge*, 34 Pac. 227,

228 (1893). "The right to have the courts open is a right of the public. . . " *State v. Capp*, 15 N.H. 212, 215 (1844).

Thus, your amici submit that the unbroken pattern of open judicial proceedings in England prior to Colonial independence, and in the United States thereafter, is more than a tradition. It is an "immemorial right" reflecting very significant democratic social policies, and it is "retained by the people" under the Ninth Amendment. To use the words of Justice Goldberg in *Griswold v. Connecticut*, *supra* at 491:

> To hold that a right . . . so basic and fundamental and deep-rooted . . . may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

III

THE CONSTITUTIONAL RIGHTS OF THE PUBLIC TO ATTEND JUDICIAL PROCEEDINGS CANNOT BE DENIED ABSENT A CLEAR AND PRESENT DANGER TO A DEFENDANT'S RIGHT TO A FAIR TRIAL AND A CLEAR SHOWING THAT LESS INTRUSIVE MEASURES WILL BE INEFFECTIVE IN PROTECTING THE DEFENDANT'S RIGHTS

The fundamental question which this Court must address is whether the First, Sixth and Ninth Amendments to the Constitution guarantee to the public a right of access to criminal trials. Because of the fundamental character of the rights asserted and their constitutional foundations, this Court should impose the highest standard of judicial protection for such rights. Nothing less than a showing of clear and present danger to a constitutional right of equal stature, a defendant's right to a

fair trial, must be required prior to closing a criminal trial.

In *Gannett v. DePasquale*, *supra*, this Court clearly delineated cases involving access to criminal proceedings from cases wherein prior restraints on publication are imposed. Recognizing this distinction, your amici respectfully submit that the immemorial right of the people to attend criminal trials deserves the same judicial protection as the right of the press to publish accurate information lawfully obtained.

The American Bar Association Task Force on Fair Trial and Free Press chaired by Judge Alfred T. Goodwin of the Ninth Circuit Court of Appeals, after eleven years of intensive study, has adopted the standards set forth in *Nebraska Press Ass'n. v. Stuart*, *supra*, with regard to closure of pretrial proceedings. See Appendix A (full text). Standard 8-3.2 states that closure may be ordered only if:

> (1) dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and,
>
> (2) the prejudicial effect of such information upon trial fairness cannot be avoided by any reasonable alternative means.

The *Commentary* on this Standard suggests the following specific alternatives: "(1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration of the jury, and (8) admonitory instructions to the jury."

In addition to the American Bar Association provisions cited above, your amici respectfully urge this Court to adopt a rule that would forbid closure of a criminal

proceeding in the absence of an assessment of the probable efficacy of the action. In *Nebraska Press Ass'n. v. Stuart, supra*, Chief Justice Burger, writing for the majority, required such an assessment of the Court's order "as a workable method of protecting the defendant's right to a fair trial prior to the setting aside of First Amendment rights." *Id.* at 565. In rejecting the efficacy of the gag order, Chief Justice Burger recognized the dangers inherent in the transmission of rumors where accurate reports of criminal trials are not available to the public:

> [G]iven the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts.

Id. at 567. Secret trials clearly give rise to a much greater degree of speculation. Under a gag order, such as the one in *Nebraska Press*, accurate oral reports may be disseminated by those in attendance. Under a closure order where only the parties are present, totally unfounded speculation concerning a conviction or acquittal is inevitable.

The importance of assessing the efficacy of any state action which inhibits a constitutional right was affirmed as recently as the last term of this Court in *Smith v. Daily Mail Publishing Co.*, ____U.S.____, 61 L.Ed.2d 399 (1979).

Justice Rhenquist addressed this issue in his concurring opinion:

> I believe that an obvious failure of a state statute to achieve its purpose is entitled to considerable weight in the balancing process that is employed in deciding issues arising under the First and Fourteenth Amendment protections accorded freedom of expression.

Id. at 409 n. 3.

Your amici respectfully urge this Court to clarify this area of the law by adopting the standards set forth in *Nebraska Press Ass'n. v. Stuart, supra*.

The majority opinion of this Court in *DePasquale*, while acknowledging that a defendant has no absolute right to compel a private trial, does not prescribe adequate standards against which, in the context of potentially prejudicial pretrial publicity, a defendant's motion for closure must be weighed. Justice Stewart has correctly observed in *DePasquale*, that, with the possible exception of the right to assistance of counsel,[12] Sixth Amendment guarantees do not, as a matter of law, confer on a criminal defendant the right to demand their opposites. 61 L.Ed.2d at 623. *See also, Singer v. United States*, 380 U.S. 24 (1965) (right to jury trial); *Barker v. Wingo*, 407 U.S. 514 (1972) (right to speedy trial). This principle is buttressed by the fact that, regardless of whether the public's right to attend judicial proceedings is of constitutional magnitude, "there is a strong societal interest in public trials." *Gannett v. DePasquale, supra* at 623. Courts do not have unrestricted power to "suppress, edit, or censor events or publication thereon which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367 (1947).

> The law . . . favors publicity in legal proceedings so far as that object can be attained without injustice to the persons immediately concerned.

2 COOLEY, CONSTITUTIONAL LIMITATIONS 931-932 (Covington ed. 1927)

In holding that the television media do not have the right to overcrowd a courtroom with reporters, lighting and camera equipment so as to deny in a pretrial hearing the "judicial serenity and calm to which [a defendant is]

[12] See Faretta v. California 422 U.S. 806 (1975)

entitled, "*Estes v. Texas*, 381 U.S. 532 (1965), this Court observed:

> It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be . . .

Id. at 541.

Thus, it becomes the defendant's burden to justify closure of presumptively open proceedings. See, *e.g.*, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 at 562, 569, 571; *Nebraska Press Ass'n. v. Stuart*, 423 U.S. 1327, 1333 (1975) (Blackmun, Circuit Justice, mem.). This burden requires the defendant to establish a causal relationship between the exercise of the right to attend open proceedings, and the substantive evil which the government is empowered to regulate (the unfair trial). This burden is necessarily heavy because, in the first place, "in the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important [Sixth Amendment] right." *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 at 551.

Of course, it cannot be denied that extremely inflammatory and prejudicial publicity may create "tensions . . . between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment." *Id.* Yet, "cases such as these are relatively rare, and we have held that trials have been fair in spite of widespread publicity." *Id.* at 554.

The reason why "pretrial publicity—even pervasive, adverse publicity—does not [necessarily] lead to an unfair trial" is that "the capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity . . ." *Nebraska Press Ass'n. v. Stuart*, *supra* at 554-555; see also, *Murphy v. Florida*, 421 U.S. 794 (1975).

Requiring that a defendant present some factual justification for conducting judicial proceedings in secret is made difficult, yet all the more appropriate, because any determination that conducting a trial or pretrial hearing in public will ultimately deny a defendant a trial before an impartial jury is "of necessity speculative, dealing . . . with factors unknown and unknowable." *Nebraska Press Ass'n. supra*, at 563. *Accord*, *Id.* at 599, 604 (Brennan, J., concurring opinion). The court must speculate about the amount and nature of the evidence which will be publicly disclosed and its impact upon the veniremen. Lastly, the judge must consider whether the information suppressed through closure might leak out in any event, or perhaps "become available through rumors and gossip, whether or not the press is enjoined from [attending the proceeding]." *Nebraska Press Ass'n.*, *supra*, at 599, n. 22 (Brennan, J., concurring opinion).[13]

But more importantly, the burden of establishing the need for closure must remain heavy because there are measures available to a trial court which can protect against impartial juror prejudice in ways much less damaging to the First Amendment and other societal policies served through public proceedings. "[M]embers of the press and public objecting to the exclusion have the right to demand that it extend no further than is likely to achieve these goals." *Gannett v. DePasquale*, *supra*, at 634 (Powell, J., concurring opinion).[14] This principle is in

[13] "Indeed, the media in such situations could help dispel erroneous conceptions circulating among the populace." *Id.* at 599 fn.22 (Brennan, J., concurring opinion).

[14] "There can be no ducking of the problem of the press prejudging trials even if the occurrence is seldom and is almost solely confined to *causes celebres*. But the solutions that we seek must be appropriate to the difficulties, both to their nature and to their frequency. The question is not a matter of neglecting to find a remedy but to find one no more painful than the illness demands." A. FRIENDLY AND R. GOLDFARB, CRIME AND PUBLICITY, 71 (1967)

accord with the holdings in previous cases that First Amendment freedoms cannot be subordinated by one means, where alternative means less restrictive of First Amendment liberties, yet effective, are available. *See, e.g., Nebraska Press Ass'n. v. Stuart, supra,* at 562-565; *Gooding v. Wilson,* 405 U.S. 518, 522 (1973); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 183 (1968); *Cantwell v. Connecticut,* 310 U.S. 296, 304 (1940); *Scott v. Scott,* (1913) A.C. 417, 438 (Vicount Haldane L.C.). (Before the Courts of England may be closed, those who would close them "must satisfy the Court that by nothing short of the exclusion of the public can justice be done.")

Your amici urge this Court to adopt the rule which the Constitution requires that a criminal trial may be closed to the public only where:

> (1) there is a strong showing that prejudicial publicity will create a clear and present danger to the fairness of the trial;
>
> (2) the prejudicial effect of such information cannot be avoided by alternative means; and
>
> (3) a strong showing is made that closure will accomplish its purpose of preventing jury prejudice.

CONCLUSION

It would indeed be a sad day in the history of our country's jurisprudence if the Commonwealth of Virginia, the birthplace of the Bill of Rights, should cause the loss of an immemorial right to open trials in our society. George Wythe, Patrick Henry, Thomas Jefferson, George Mason, James Madison and many other great patriots would wonder at what has happened to their dream! Your amici cannot but believe that this Court will devote sufficient time, effort and legal historical research to this question to

undo the confusion that has been allowed to grow in this field. We plead with you, with all the respect and vigor in our minds, to correct the misapprehension that has been permitted to arise from what appear to be narrow attempts to address broad constitutional questions of the greatest significance to the social fabric of our Nation. We most respectfully urge that the Supreme Court of Virginia be found in error and that this Court reconsider its ruling made in *DePasquale* so that once and for all, certainly in this century and hopefully for the constitutional future of our Nation, no one will question the fact that open judicial proceedings must be maintained for the good of our entire society. Only in the most egregious circumstances, examples of which are almost nonexistent in our constitutional history, should any judicial proceeding be closed to the public and under our republican form of democracy to the public's representative, the press.

Your amici appreciate this opportunity to have presented these views to this distinguished body and we await with great interest the resolution of these vital questions.

Respectfully submitted,

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APPENDIX

APPENDIX A

AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE

Standard 8-3.2. Pretrial proceedings: exclusion of public and sealing of records

Except as provided below, pretrial proceedings and their record shall be open to the public, including representatives of the news media. If at the pretrial proceeding testimony or evidence is adduced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the inpaneling of the jury or until an earlier time consistent with the fair administration of justice. The presiding officer may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a motion to suppress, and may seal the record only if:

(i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and

(ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.

The defendant may move that all or part of the proceeding be closed to the public (including representatives of the news media), or, with the consent of the defendant, the presiding officer may take such action sua sponte or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial proceeding is held in chambers or otherwise closed to the public, a

complete record shall be kept and made available to the public following the completion of trial or earlier if consistent with trial fairness.

History of Standard

This is original standard 3.1. Several changes have been made; some are organizational or for clarification, while others are substantive. First, the standard governs both the closing of pretrial proceedings and the sealing of court records. Second, the standard establishes a clear-cut presumption in favor of the openness of pretrial proceedings and court records. As an alternative to either procedure, the standard encourages the development of voluntary agreements between the press and the courts concerning the publication of information which might affect the defendant's right to a fair trial. Finally, if a motion is made for closure of a pretrial proceeding or the sealing of court records, a two-part standard applies that combines the clear and present danger and least restrictive alternative tests. This standard is more rigorous than the test in original standard 3.1, which was based on the "substantial likelihood of interference" formulation.

Related Standards

None

Commentary

The policy underlying this standard is a strong presumption in favor of open judicial proceedings and free access to records in a criminal case. Although this standard deals only with pretrial proceedings, the general principle extends to every phase of judicial proceedings in a criminal case.

The sixth amendment speaks in terms of the right of the accused to a public trial,[1] but this right does not belong solely to the accused to assert or forgo as he or she desires.[2] Many courts have recognized that the public generally has an overlapping and compelling interest in public trials.[3] The defendant's interest, primarily, is to ensure fair treatment in his or her particular case. While the public's more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. The transcendent reason for public trials is to ensure efficiency, competence, and integrity in the overall operation of the judicial system.[4] Thus, the defendant's willingness to waive the right to a public trial in a criminal

[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI *See In re Oliver*, 333 U.S. 257 (1948). The Supreme Court has also held that due process "demands appropriate regard for the requirements of a public proceeding in . . . all adjudications through the exercise of the judicial power." Levine v. United States, 362 U.S. 610, 616 (1962).

Although there is authority holding that preliminary proceedings are not within the meaning of the sixth amendment, Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), the great majority of courts have rejected that view. *See, e.g.*, United States v. Clark, 475 F.2d 240 (2d Cir. 1973); Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969) (en banc).

[2] United States v. Cianfroni, F.2d, 3 Med. L. Rptr. 1961, 1970-72 (March 16, 1978); United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949) (en banc); United States v. Lopez, 328 F.Supp. 1077, 1087 (E.D.N.Y. 1971); Commercial Printing Co. v. Lee, 553 S.W.2d 270 (Ark. 1977); Keene Publishing Co. v. Keene Dist. Court, 380 A.2d 261 (N.H. 1977); People v. Marino, 383 N.Y.S.2d 147 (Cty. Ct. 1976). *See also* Singer v. United States, 380 U.S. 24 (1965).

[3] *See* cases cited in note 2 *supra*.

[4] These themes are emphasized to varying degrees in all of the cases cited in note 2 *supra*. The theme of judicial integrity, however, has been a paramount concern to the Supreme Court, and the role of the press in promoting that value has been

(footnote continued on next page)

case cannot be the deciding factor. This holds true no matter how personally beneficial private proceedings in a criminal case might be to the defendant. It is just as important to the public to guard against undue harshness or discrimination.[5]

The role of the news media in this process is especially significant. Few individuals have the time or inclination to observe personally the operation of the criminal justice system. Representatives of the news media largely serve that function. It has been argued that the press has a first amendment right of access to the courts and court records that exceeds such rights of members of the public generally. This view has been rejected by the courts.[6]

The policy in this standard in favor of open proceedings and free access to court records rests on sixth amendment grounds. It is subject to important limitations. When there is a threat to the defendant's right to a fair trial, the trial judge is obligated to take steps to neutralize that threat. The first step in the process should be to seek a voluntary agreement with members of the news media about the timing and scope of coverage. It is undesirable to resolve such questions by litigation without first considering informal and less antagonistic measures. The use of voluntary fair trial/free press agreement is already a practice in many jurisdictions, and the trend should be

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(footnote continued from previous page)

consistently recognized. Landmark Communications, Inc. v. Virginia, 46 U.S.L.W. 4389, 4392-93 (May 1, 1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60, 606 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-96 (1975); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); *In re* Oliver, 333 U.S. 257, 270-71 (1948).

[5] *In re* Edens, 226 S.E.2d (N.C. 1976).

[6] Pell v. Procunier, 417 U.S. 817 834-35 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); United States v. Gurney, 558 F.2d 1202, 1208-09 (5th Cir. 1977); Garrett v. Estelle, 556 F.2d 1274, 1277-78 (5th Cir. 1977).

encouraged.[7] In any event, if a voluntary agreement is reached between representatives of the news media and the court, any delay in the publication of potentially prejudicial information should be only until the impaneling of the jury, and shorter if possible.

The principles embodied in standard 8-3.2 represent a significant departure from original standard 3.1. The substance of the standard, however, is the option of closing pretrial proceedings and sealing judicial records. Before pretrial proceedings can be closed or any record sealed, the two-part test of the standard must be met. The moving party must establish that: (1) a clear and present danger to the fairness of the trial would exist if the information were publicly disclosed, and (2) the prejudicial effect of such information on the fairness of the trial cannot be avoided by reasonable alternative means. The standard does not enumerate possible procedural alternatives, but the effectiveness of the following should receive serious consideration: (1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration of the jury, and (8) admonitory instructions to the jury.[8]

The public interest in open proceedings and free access to courts in a criminal case is at least as strong as the first amendment policy against prior restraints. Consequently, this standard follows the basic approach taken

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[7] As of June 1974, twenty-three states adopted voluntary fair trial/free press guidelines. ABA, FAIR TRIAL/FREE PRESS VOLUNTARY AGREEMENTS (1974).

[8] The Supreme Court noted several of these measures in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-65 (1976). Others are enumerated in a report to the Senate Subcommittee on Constitutional Rights. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, FREE PRESS-FAIR TRIAL, 94th Cong., 2d Sess. 8-10 (1976).

by the Supreme Court in *Nebraska Press Association v. Stuart*.[9] Although developed in the context of a prior restraint case, that approach or its equivalent has been applied in the present context by a number of courts.[10] The question might legitimately be raised, however, why the *Nebraska Press Association* test is adopted in this standard but rejected in standard 8-3.1. The answer lies in the fact that there is a crucial difference between imposing prior restraints against the press on the one hand and the denial of access to news sources on the other. The administration of a system of prior restraints necessarily involves the courts in overseeing the press; the entanglement of the courts and the press results in unavoidable and perhaps unintended suppression of first amendment values no matter how carefully or conscientiously a court may draw the line between protected and unprotected speech.[11] There is less difficulty where closure of judicial proceedings and sealing of court records are at issue. Hence, case-by-case adjudication is acceptable under this standard, but not under standard 8-3.1.

The last paragraph in standard 8-3.2 requires that any motion to close a pretrial proceeding or seal court records be made with the consent of the defendant. The motion, however, cannot be granted unless the court affirmatively concludes that the requirements of the clear and present danger and least restrictive alternative tests have been met. The burden of proof is on the party making the motion. The standard thus clarifies the language of original standard 3.1 stating that the motion to

[9] 427 U.S. 539, 562-65 (1976).

[10] *See e.g.*, United States v. Cianfroni, F.2d, 3 Med. L. Rptr. 1961 (March 16, 1978); Keene Publishing Corp. v. Keene Dist. Court, 380 A.2d 261 (N.H. 1977); State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977).

[11] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 724-31 (1978).

close a pretrial hearing "shall be granted unless the presiding officer determines that there is no substantial likelihood"[12] of interference with the defendant's right to a fair trial by an impartial jury.

The last sentence in standard 8-3.2 provides that when a procedure is held in chambers or otherwise closed to the public, a complete transcript shall be kept and made available after the conclusion of the trial or disposition without trial. The purpose of this requirement is to provide a surrogate method of examining the conduct of closed proceedings. The transcript is the only possible substitute for the denial of access.

[12] ABA, FAIR TRIAL AND FREE PRESS 113 (1968).

Supreme Court, U. S.
FILED
SEP 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979
No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

RICHARD H.C. TAYLOR,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

RICHARD H.C. TAYLOR,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF VIRGINIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF JURISDICTIONAL STATEMENT. *AMICUS CURIAE*

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IN THE
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October Term, 1979
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RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN McCARTHY,
Appellants,

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COMMONWEALTH OF VIRGINIA,
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ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF VIRGINIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF JURISDICTIONAL STATEMENT, AMICI CURIAE

Interest of Amici Curiae*/

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*/ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

For fifty-nine years, the American Civil Liberties Union and its state affiliates, including amicus ACLU of Virginia, have devoted themselves to protecting the civil liberties of the American people. Public trials are among the constitutional safeguards which secure these liberties of a free people. Public scrutiny of the trial process helps to ensure that the great power of the criminal law operates fairly and responsibly under the watchful eye of those for whom it is exercised. Accordingly, hand in hand with its commitment to fair trials -- the ACLU joined in Sheppard v. Maxwell, 384 U.S. 333 (1966), urging that the petitioner had been deprived of his Sixth Amendment right to a verdict untainted by prejudicial publicity -- the ACLU has also supported the right of the public and the press to attend criminal trials. See Brief of the American Civil Liberties Union, Amicus Curiae, Gannett Co., Inc. v. DePasquale, No. 77-1301 (1978 Term).

The ACLU, moreover, has a special interest in the questions presented here. In the wake of Gannett v. DePasquale, 61 L. Ed.2d 608 (1979), the United States moved to close the entire appellate argument in the Seventh Circuit in the

government's prior restraint case against The Progressive Magazine, whose editors are represented by ACLU attorneys.[1] The Gannett decision is being misapplied in numerous other cases throughout the country as well, and ACLU affiliates are involved in many of those cases. Even if those misapplications of Gannett are eventually corrected by appellate courts, public rights will be unjustifiably abridged in the meanwhile. As this Court has frequently recognized, time is often of the essence in reporting news; and a journalistic summary of a cold appellate transcript, months after decision is rendered, can hardly substitute for immediate public attention to and criticism of the arguments of its public servants in the public's courts.

The ACLU rarely files amicus briefs in support of jurisdictional statements. However, never, to amici's knowledge, had any American court undertaken to close an entire criminal trial to the public, before this Court's decision in Gannett. The

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1. The Progressive case has already been before this Court. See Morland v. Sprecher, No. 78-1904, 47 U.S.L.W. 3838 (July 2, 1979).

unprecedented trial closing of the Virginia trial court here, part of a wave of closed judicial proceedings spawned by widespread confusion and misunderstanding of this Court's decision in Gannett, compels us to depart from our customary practice. Amici urge the Court to note probable jurisdiction so that it can clarify the Gannett decision, decide the First Amendment question which Gannett expressly did not reach, and vigorously affirm our nation's constitutional commitment to public scrutiny of the administration of justice in our nation's courts.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE OF NATIONWIDE SIGNIFICANCE.

Three months after this Court's decision in Gannett v. DePasquale, 61 L. Ed.2d 608 (1979), it is apparent that the Gannett decision is having a profound effect on the administration of criminal justice. Thirty years ago, this Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." In re Oliver, 333 U.S. 257, 266 (1948)(footnote omitted). Yet, since Gannett, courts throughout the nation, suddenly freed from what had heretofore been perceived as a constitutional requirement, have suddenly begun closing pretrial proceedings, trials, and post conviction proceedings as a matter of course. Verdicts have been announced in camera; charges dropped without public explanation, as in this case;[2/] guilty pleas accepted behind

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2/ The trial court granted defendant's motion to strike all the government's evidence. See Jurisdictional Statement, App. N. The grant
(FN 2 continued on next page)

closed doors.[3/]

Whatever the merits of Gannett on the facts there presented, it is already apparent that the Court's holding there has been stretched beyond its intended meaning. Although Gannett addressed only the Sixth and Fourteenth Amendment rights of the public in criminal proceedings, explicitly reserving First Amendment questions, see 61 L. Ed.2d at 629, the Virginia Supreme Court in this case, like other courts throughout the nation, has read Gannett to justify closing an entire trial. Moreover, whereas Gannett required

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of such a motion suggests possible governmental impropriety, in which the public surely has an interest. However, because the trial was held in secret, the grounds upon which the motion was granted, and therefore, the presence of any impropriety, remain unknown.

3/ The gravity of accepting secret guilty pleas can be better appreciated by considering the impact acceptance of secret pleas in the original Watergate burglary trials would have had on American political history. The presence of the public and the press at both the pretrial and the trial stages must be credited with aiding the effective administration of justice. See Sheppard v. Maxwell, 384 U.S. at 350. See also Gannett v. DePasquale, 61 L. Ed.2d at 642 (Blackmun, J. dissenting).

a showing that public proceedings would pose "a reasonable probability of prejudice to these defendants," id., and relied on the "temporary" nature of the ban imposed there, id., the closing of the entire trial in this case was made without any showing of prejudice.[4/]

4/ At the time the trial was closed the court had made no findings whatsoever, a procedure which is patently insufficient to protect the important public interests involved. Thereafter, the trial judge entertained argument by the intervenor-newspapers, who properly contended that even if the potential harm, as alleged by defense counsel, had been shown, the court could only close the trial upon finding that less drastic alternatives were unavailable. The court's "findings," rejecting those arguments, were wholly inadequate. The reasons given by the court for closure were "distract[ion] to the jury" from public attendance -- a reason presumably applicable to every court and trial in the nation -- and prophylactic protection of the defendant's rights. See Jurisdictional Statement, App. E at 16a. Although the court's motivation is noteworthy, its method was excessive.

II. GANNETT HAS SPAWNED CONFUSION AND INCONSISTENT DECISIONS THROUGHOUT THE LOWER COURTS, AND THEREFORE REQUIRES PROMPT CLARIFICATION.

The Virginia courts have read Gannett to sanction the exclusion of the public from entire criminal trials. They are not alone in that interpretation. As the Brief Amicus Curiae of the Reporter's Committee for Freedom of the Press demonstrates, an increasing number of courts are closing trials on the sole authority of Gannett. See Brief of Reporter's Committee for Freedom of the Press, Amicus Curiae, passim, and Appendix A. The broad language of the majority opinion in Gannett, joined by five members of the Court, did not preclude, and virtually invited such an interpretation. Indeed, the Justices' disagreement over Gannett's reach and meaning has continued publicly, months after the opinion was issued, with four Justices commenting openly on the decision's meaning. See. e.g., "Stevens Says Closed Trials May Justify New Laws." New York Times, Sept. 9, 1979, at 41. It is not surprising, therefore, that lower courts

have disagreed as to the reach of Gannett and have issued conflicting opinions.

This state of uncertainty jeopardizes the equal and efficient administration of justice, and the important public interests in open trials that both the dissenters and the majority recognized in Gannett. The number of cases in which defense counsel may make Gannett closing motions is without limit. Challenges by press and public to such motions absorbs important judicial time and energy. Uncertainty as to the correct standards increases the courts' burdens and where such challenges are precluded because of expense, or failure to file timely notice,[5/] trials wrongfully closed based upon the supposed authority of Gannett may escape review entirely.

5/ Where members of the public or press, for a variety of understandable reasons, decide against attending a trial at its commencement, a real "Catch-22," under one reasonable interpretation of Gannett, may result: a notice to challenge the order cannot be filed because the person wishing to enter the courtroom did not happen already to be there when the closure order is issued and cannot thereafter file a challenge because the courtroom is closed. See Gannet, 61 L.Ed.2d at 635 (Powell, J. concurring).

To avoid these dangers, and much unnecessary litigation, review of this case is essential. The Court should address the following pressing questions raised by the decision below and by inconsistent decisions in other courts:

1. whether the public or press have any presumptively protected rights of access under the Sixth Amendment as to criminal trials (not pretrial proceedings);

2. whether the public and the press have presumptively protected rights of access under the First Amendment, or other constitutional provisions not addressed in Gannett;

3. whether trials may be closed in the absence of a record finding prejudice to the defendant were an open trial to proceed, or without a finding that no less drastic alternatives would suffice:

4. whether "distract[ion] to the jury" from the presence of the public in a courtroom is a sufficient justification for closing a trial; and

5. whether trials may be closed, in the absence of a finding of harm to defendant's rights, simply to assure prophylactically that "the rights of the defendant are [not] infringed in any way" (see Jurisdictional Statement, App. E at 16a).

III. THE GANNETT DECISION LEAVES UNRESOLVED THE IMPORTANT QUESTION OF WHETHER THE FIRST AND THE FOURTEENTH AMENDMENTS PRESUMPTIVELY PROTECT PUBLIC RIGHT OF ACCESS TO CRIMINAL TRIALS.

Another issue of great importance presented by this appeal is whether the public has a right of access to criminal proceedings under the First and the Fourteenth Amendments. Although the issue of the public's right of access, in general, and that of the press, in particular, has been raised in other cases before this Court, the Court has never resolved those questions. It should do so here.

The importance of these questions is now manifest. Under our constitutional system of separation of powers, open trials have "been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In re Oliver, 333 U.S. at 270. See also, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

Moreover, apart from their value in maintaining proper checks and balances on the judicial and executive branches, open trials have long been recognized as critically important in maintaining the integrity of the criminal justice system, through, for example, decreasing the risk of perjury. See Gannett, 61 L. Ed.2d at 648-49 (Blackmun, J., dissenting).

The question of whether there is a First Amendment right of access to criminal proceedings was not resolved in Gannett. Mr. Justice Stewart, speaking for the majority, explicitly reserved the question:

> "Petitioner in this case urges us to narrow our rulings at least to the extent of recognizing a First and Fourteenth Amendment right to attend criminal trials. We need not decide in the abstract, however, whether there is any such constitutional right . . . [whether] the First and Fourteenth Amendments may guarantee access in some situations, [is] a question we do not decide . . . ."

61 L. Ed.2d at 629.[6/] [Citations and

6/ Adding still further to the confusion of the bench and the bar concerning the Gannett decision, are the concurring and dissenting

(FN 6 continued on next page)

footnote omitted.]

Nor did earlier cases touching on the right of public access to government information resolve the question raised here -- whether there is a First Amendment right to attend criminal trials -- and its scope if such a right exists. Although the Court in

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justices' own interpretations of the First Amendment question reserved by the Court. Mr. Justice Rehnquist, in his concurring opinion, stated:

> "Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right to access in the public or the press to judicial or other government proceedings."

61 L. Ed.2d at 637 [Citations omitted]. On the other hand, Mr. Justice Powell would have held specifically that the First and Fourteenth Amendments protect the right of the public and the press to attend criminal proceedings. Id. at 632. Mr. Justice Blackmun, with whom Justices Brennan, White and Marshall joined, stated: "Despite Mr. Justice Powell's concern, ante, this Court heretofore has not found and does not today find, any First Amendment right of access to judicial or other governmental proceedings." Id. at 641.

Branzburg v. Hayes, 408 U.S. 665, 707 (1972) found that news gathering was entitled to some First Amendment protection, and although the Court has frequently struck down restrictions directed at press reporting of information of public concern, see, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court has not found a First Amendment right of access to information within the government's exclusive control. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) and Pell v. Procunier, 417 U.S. 817, 834 (1974). On the other hand, the history of public access to trials, dating back to the beginnings of Anglo-Saxon law, suggests that the public's right to attend criminal trials may be far different in origin and scope from an asserted right to government information generally.

In addition to the First Amendment question reserved in Gannett, other constitutional sources suggest themselves as bases upon which a public right to attend criminal trials may be predicated.7/ These other

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7/ The Court recognized the existence of rights which, although not specified in an express constitutional provision, have been found to be "necessary to an Anglo-American
(FN 7 continued on next page)

sources should be fully addressed by this Court before lower courts proceed to alter permanently the public character of trials under mistaken interpretations of Gannett. See generally, 61 L. Ed.2d at 638 (Blackmun, J. dissenting). Indeed, because the right of publid access to criminal trials is so important and of such long standing in the Anglo-American legal tradition, the right may be recognized as a constitutional right even in the absence of a specific constitutional provision.

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regime of ordered liberty," Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968), or one of the privileges or immunities of national citizenship. See Edwards v. California, 314 U.S. 160 (1941). See generally, Tribe, American Constitutional Law at 415-521 (1978). For example, the Court recognized the right not to be convicted without proof beyond a reasonable doubt, Mullaney v. Wilbur, 421 U.S. 684 (1975), and In Re Winship, 397 U.S. 358 (1970); the right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to vote in state elections, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); and the right to travel interstate, see United States v. Guest, 383 U.S. 745 (1966).

CONCLUSION

This Court has declared on a prior occasion, "A trial is a public event. What transpires in the court is public property." Craig v. Harney, 331 U.S. 367 at 374 (1947). The decisions in the instant case and that of Gannett v. DePasquale, raise important and serious questions about the continued vitality of the public trial. For this and the foregoing reasons, the Court should note probable jurisdiction and set this appeal for argument on the merits.

Respectfully submitted,

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September 13, 1979

Supreme Court, U. S.
FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., ET AL.,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

(And Two Companion Cases)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

JURISDICTIONAL STATEMENT FILED AUGUST 14, 1979
JURISDICTION POSTPONED OCTOBER 9, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

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No. 79-243

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Appellants,

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ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

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Chronological List of Important Dates

March 16, 1976	Commonwealth of Virginia grand jury for Hanover County indicts John Paul Stevenson for murder of Lillian Emma Keller.
July 16, 1976	Defendant Stevenson convicted of second-degree murder of Lillian Emma Keller in Hanover County Circuit Court jury trial.
October 7, 1977	Virginia Supreme Court reverses defendant Stevenson's conviction and remands case to Hanover County Circuit Court.
May 30, 1978	First retrial of defendant Stevenson begins in Hanover County Circuit Court; mistrial declared.
June 6, 1978	Second retrial of defendant Stevenson begins in Hanover County Circuit Court; mistrial again declared.
September 11, 1978	Third retrial of defendant Stevenson begins in Hanover County Circuit Court. Shortly after case is called, Circuit Court by oral order grants defense motion to close entire trial to public and press; appellants Wheeler and McCarthy ejected from courtroom. In afternoon hearing, Circuit Court by oral order permits appellants Wheeler and McCarthy, and appel-

lant Richmond Newspapers, Inc., their employer, to intervene for purpose of arguing that trial should be opened to public and press; appellants Wheeler and McCarthy forbidden to attend hearing on their exclusion from defendant Stevenson's trial; Circuit Court by written order denies motion to vacate closure order.

September 12, 1978 — Hanover County Circuit Court proceeds with trial of defendant Stevenson in secrecy; excuses jury; takes under advisement motion of defense counsel that mistrial be declared; sustains defense motion to strike Commonwealth's evidence; finds defendant Stevenson not guilty—still in absence of jury, public, and press.

September 27, 1978 — Appellants file written petition in Hanover County Circuit Court to intervene *nunc pro tunc* in trial of defendant Stevenson; Circuit Court by written order *nunc pro tunc* grants petition to intervene.

Appellants file in Hanover County Circuit Court notice of appeal to Virginia Supreme Court.

November 8, 1978 — Appellants file in Virginia Supreme Court petitions for appeal from Hanover County Circuit Court's closure order and for writs of man-

damus and prohibition ensuring access to trial of defendant Stevenson and to all future criminal trials in Hanover County Circuit Court.

July 9, 1979 — Virginia Supreme Court enters judgments refusing appellants' petition for appeal and dismissing appellants' petitions for writs of mandamus and prohibition, citing *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979).

August 13, 1979 — Appellants file in Virginia Supreme Court and in Hanover County Circuit Court notice of appeal to United States Supreme Court.

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Defense Motion To Close Entire Trial To Public And Press, Including Circuit Court's Oral Order Excluding Public And Press From Defendant Stevenson's Trial, Dated September 11, 1978

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

COMMONWEALTH OF VIRGINIA,

—vs.—

JOHN PAUL STEVENSON

TRANSCRIPT of MOTION in the above when heard on *September 11, 1978,* before Honorable Richard H. C. Taylor, Judge.

APPEARANCES:

Patrick R. Bynum, Jr., Attorney at Law, Commonwealth's Attorney for Hanover County, Virginia;

C. Willard Norwood, Attorney at Law of NORWOOD & NORWOOD, 304 West Broad Street, Richmond, Virginia 23229, Counsel for the Defendant;

John Paul Stevenson, the Defendant, in person.

[2] Note: At the calling of the case at 10:00 o'clock a.m., the Court Reporter first being duly sworn, the matters are begun as follows, viz:

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Defense Motion To Close Entire Trial To Public And Press, Including Circuit Court's Oral Order Excluding Public And Press From Defendant Stevenson's Trial Dated September 11, 1978

The Court: Mrs. Wright, let the record show that Mr. Stevenson is present; his lawyer, Mr. Norwood, is present; and the Commonwealth's Attorney is present.

Mr. Stevenson has already been arraigned and pleaded not guilty, I believe, Mr. Norwood.

Mr. Norwood: Yes, Your Honor.

The Court: It's not necessary to go through that again, I don't think.

Mr. Norwood: No, sir.

The Court: Are there any preliminary motions before we bring in the jury?

Mr. Norwood: Uh, there was this woman that was with the family [3] of the deceased when we were here before. She, uh, had sat in the Courtroom. I would like to ask that everybody be excluded from the Courtroom because I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what.

Also, I have no objection to the, uh, jury being just drawn in numerical order according to the list. It's not necessary to go by lot because we only have about twenty-four so we're going to get most of them.

The Court: We normally do it by lot. Are you specifically requesting the other way?

Mr. Norwood: It really doesn't make any difference.

The Court: I think that, uh, uh, whichever way ya'll—

Mr. Bynum: I prefer to do it by lot. I think the Clerk has already prepared to do it. You've only got four extra anyway so—

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Defense Motion To Close Entire Trial To Public And Press, Including Circuit Court's Oral Order Excluding Public And Press From Defendant Stevenson's Trial Dated September 11, 1978

[4] The Court: Yes. Do you have any objection to clearing the Courtroom, Mr. Bynum?

Mr. Bynum: Uh, no, sir, I'll leave it to the discretion of the Court. Are you talking about every—are you talking about everyone; the press included? Is that—does your motion extend to them?

Mr. Norwood: Yes, sir, that would be my motion.

The Court: All right, sir.

Mr. Bynum: It's in the discretion of the Court. You know, I—I understand, you know. It's strictly on defense motion.

The Court: Yes, sir, well, the statute gives me that power specifically—

Mr. Bynum: Yes, sir.

The Court: —and the defendant has made the motion and I'll rule that the Courtroom be kept clear of all parties except the witnesses [5] when they testify.

Mr. Norwood: Also, Your Honor, I would like to, uh, interrogate the jurors individually.

The Court: All right, you want individual voir dire?

Mr. Bynum: Do you want individual voir dire?

Mr. Norwood: Yes, sir.

The Court: Do you have any objection to that, sir?

Mr. Bynum: No, sir.

The Court: Okay, we'll do the voir dire individually.

[Certificate of Court Reporter Omitted In Printing]

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Appellants' Motion To Vacate Order Closing Entire Trial To Public And Press, Including Circuit Court's Unreported Oral Order Denying Appellants' Motion To Vacate Closure Order Of September 11, 1978

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

[Title Omitted In Printing]

TRANSCRIPT OF MOTION in the above when heard on *September 11, 1978,* before Honorable Richard H. C. Taylor, Judge.

[2] APPEARANCES:

Patrick R. Bynum, Jr., Attorney at Law, Commonwealth's Attorney for Hanover County, Virginia;

Alexander Wellford and William F. Etherington, Attorneys at Law of CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL, 1200 Mutual Building, Richmond, Virginia 23219, Counsel for Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy;

C. Willard Norwood, Attorney at Law of NORWOOD & NORWOOD, 304 West Broad Street, Richmond, Virginia 23229, Counsel for the Defendant;

John Paul Stevenson, the Defendant, in person.

[3] Note: At the calling of the case at 4:55 o'clock p.m., the Court Reporter having previously duly sworn, the matters are begun as follows, viz:

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Appellants' Motion To Vacate Order Closing Entire Trial To Public And Press, Including Circuit Court's Unreported Oral Order Denying Appellants' Motion To Vacate Closure Order Of September 11, 1978

The Court: I think we have to treat this, Mr. Wellford, as a part of the original trial that we're in. I know this is going to, uh, increase your position in your motion, but I—the Court ruled that the Courtroom had to be cleared and I'm going to have to ask the reporters to leave at this time, too.

Mr. Wellford: All right, sir.

Note: Reporters Wheeler and McCarthy are now leaving the Courtroom.

Mr. Wellford: If I might tender the motion.

[4] The Court: Yes, sir.

Note: Motion is now being handed to the Court.

The Court: All right, since none of us have seen it, Mr., uh, Wellford, if you would, uh, make your motion for the record and go through your Memorandum so we can kind of fellow you. The lawyers may respond if they want to.

Mr. Wellford: The motion, Your Honor, is to open this trial to the press and the public. Now, I understand that this morning the Court ruled that the public and the press would be excluded. I understand that it was on the motion of the defendant. I do not know whether the Commonwealth took a position, uh, one way or the other, but I don't think that that is material.

We have appended to the [5] motion a bobtail Memorandum which cites some of the cases. Rather than to read the Memorandum to you, I'd like to make, uh, an argument based [on] the points that we are advancing.

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Appellants' Motion To Vacate Order Closing Entire Trial To Public And Press, Including Circuit Court's Unreported Oral Order Denying Appellants' Motion To Vacate Closure Order Of September 11, 1978

Now, the Supreme Court of the United States has said on a number of occasions that prior restraint on speech and publication is the most serious and least tolerated—least tolerable infringement on First Amendment rights. Now, that statement is from Nebraska Press Association against Stewart which was decided in 1975.

The Court continues: "Only the most exigent circumstances warrant the issuance of an Order curtailing the right of the press to publish. All other measures within the power of the Court to ensure a fair trial must be found to be unavailing or deficient." [6] Now, I'll read that again. "All other measures within the power of the Court to ensure a fair trial must be found to be unavailing or deficient."

Nebraska Press involved a gag order issued at the conclusion of a preliminary hearing. This order, of course, excludes the press from the, uh, proceeding itself and does not purport to prohibit the press from publishing, but the case that I'm looking at now is the one cited in the Memorandum, Gannett Company against DePasquale, which also dealt with the exclusion of the press from a hearing, albeit a preliminary hearing.

As to the question of equating exclusion of the press with a gag order, which is unquestionably a prior restraint, the Court said this: There was a second infirmity which overshadows the right of the public to open [7] judicial proceedings. The exclusionary order entered here infringed petitioner's First Amendment rights in that it constituted a violation of the right of the press to publish free from

unlawful govermanic [*sic*] interference. It is clear that a closed trial order restricts media access to information ordinarily made available to the general public. By denying access to the media a trial Judge can effectively prevent the publication of testimony or other information deemed prejudicial to the accused. It is this feature of the instance [*sic*] closed trial order that is attacked by petitioner as an infringement upon its First Amendment rights.

Logic compels the conclusion that where an exclusionary order is entered merely as a substitute for a gag order, which would otherwise place a direct [8] restraint on what the press can publish, such exclusionary order infringes upon protected First Amendment rights. An exclusionary order is merely a substitute for a direct prior restraint whereas here the sole purpose behind the order is to prevent the publication of what transpires in the Courtroom during a pretrial hearing.

The fact that such an order constitutes a novel form of censorship cannot insulate it or shield it from constitutional attack. In the area of indispensable First Amendment liberties the Supreme Court has been careful not to limit their protection to any particular way of abridging it—the citation there is Goschen against American Press Company; then it continues—since abridgement of such rights, even though unintended, may inevitably come from varied forms of governmental action.

[9] Where an exclusionary order is directed at the press to prevent the publication of material prejudicial to the

defendant, First Amendment rights are abridged to the same degree as in the case of a gag order directing the press not to publish the asserted prejudicial information.

Now, the case that I am referring to, Gannett against DePasquale, points out that it is not just the right of the defendant that is interested in the proceedings in a Court and it states: The accused in a criminal prosecution has a constitutional right to a public trial, but the public trial guarantee does not inure to the benefit of the accused alone. The public has a vital interest in open judicial proceedings, especially criminal proceedings, to ensure that the integrity of the judicial process remains intact. Public trials serve [10] to instill a sense of public trust in our judicial process by preventing the abuse or abuses of secret tribunals as exemplified by the inquisition, Star Chamber, and lettre de cachet.

The searchlight of a trial which is open to the public serves as a restraint against the abuse of judicial power. A trial is a public event. Which—what transpires in the Courtroom is public property.

Then it continues: Precisely because the public at large has a vital stake in the concept of a public trial, the circumstances under which a trial Court may order closure have been closely circumscribed. Closure is permitted only in unusual circumstances or upon a clear showing that such an order is required to prevent a serious and imminent threat to the integrity of the trial.

[11] In the Nebraska Press case the Court found, and this is the United States Supreme Court, found that a re-

viewing Court must examine the evidence before the trial Judge when the order was entered to determine the nature and extent of pretrial news coverage, whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity, how effectively a restraining order would operate to prevent the threatened danger. The reviewing Court should then consider whether the record supports the entry of a prior restraint on publication.

Now, that case, as I pointed out, entailed a gag order. In this case there has been no evidential finding so far as I know by the Court prior to the entry of this order. The public and the press have not been allowed to be heard. There has been no consideration [12] of other measures within the power of the Court to ensure a fair trial and I should add that there are cases which allude to sequestration of the jury or changes of venue as providing the appropriate alternative and superior alternatives than to prior restraints.

Now, for the foregoing reasons I submit to the Court that the trial should be open to the public.

Thank you.

The Court: Mr. Wellford, uh, the cases that you cited, uh,uh, and you gave me the benefit of some of them a few months ago when we had a question like this came—come up, uh, don't they all go to the point that the Court has to weigh, uh, in its own mind, uh, the different rights of the public or the rights of the defendant as against the rights

of the public or the rights of the defendant as against the [13] rights of the press?

Mr. Wellford: I think that is certainly a part of the evaluation, Your Honor. There's no question about the Sixth Amendment right of the defendant, but this particular action of the Court is the one infringement on the First Amendment that must be most severely tested, and Meer [*sic*] against Minnesota is the leading case in this area in which prior restraint was deemed to be bad.

I know of no case in which the Supreme Court of the United States has approved a closed trial. There are situations in which, uh, hearings are held on suppression motions and the Court actually entertained whether or not the rights of the defendant might be adversely affected and whether or not, uh, there is some remedy that can offset the adverse effect. But I believe that the law is before [14] the Court that to enter an order such as you have entered today, it must, in fact, entertain alternatives which might protect the defendant's rights.

Now, not heard—having heard the motion, I do not know the injury which the Court seeks to prevent by the entry of this order. If it is the possibility that the jury, uh, may read the newspaper tomorrow and read evidence which it would otherwise not be entitled to see or hear in Court, then I submit to you that the answer constitutionally is that the jury be sequestered and that when you balance the First Amendment right against the inconvenience of the

jury, constitutionally the First Amendment right overrides that inconvenience.

If the purported ill, the damage to the defendant's right, cannot be corrected in that fashion or in any other fashion, then the [15] Court's order arguably will stand, but I don't know of any case—not one case—before the United States Supreme Court in which a prior restraint has been upheld. The most startling case of all was the one involving the Pentagon papers in which they tried—the Pentagon and Justice Department tried to prevent publication by the New York Times of national secrets and the Supreme Court said you can't do it.

The Court: Thank you, sir.

Any of you other lawyers want to comment?

Mr. Norwood: Uh, if Your Honor please, I kind of agree. You have to look out—look at the situation or question of whether or not the right of the press supersedes all other rights and I don't believe that the framers of the Constitution and the ones who drafted [16] the Amendment intended that the First Amendment should supersede and take priority over all other rights in the rest of the Amendments to the Federal Constitution.

Uh, Your Honor knows, and Mr. Wellford is not aware of this fact, this is the fourth time that we've had, uh—attempted to have a trial since the beginning and it is the third time that we've had difficulty, uh, with information, uh, between the jurors, and on two previous occasions Your Honor declared a mistrial and that was the reason why I

wanted to avoid keep coming back up to the Court and keep having to try this case. I didn't want, uh, information to, uh, leak out and if the press writes something, you know that they don't always quote exactly verbatim what, uh, was said, unfortunately, and, uh, one of the reporters said well, can't you order the—the, uh, jurors [17] not to read the paper or not to look at television. Well, that's—you know, that's just like telling the jury to disregard that statement. There's no way that you can do it and I believe that the defendant's rights in this particular case and even in the case cited by Mr. Wellford in People versus Holder, it says in the next to the last paragraph on 9—Page 935: While there may be instances where a defendant's right to a fair trial may dictate the exclusion of the public, in the light of the decision of the Court of Appeals, this is not such a case. Now, I haven't read the facts, but I submit that in our case this is such a case due to the problems that we've previously had in reference to this case and due to the problems that this is a small community, it's not like in a big city where you've got three hundred thousand [18] people, and I submit that I don't believe that the public's rights or the right of the press supersedes the—the, uh, defendant's right to a fair and impartial trial. I think that that right supersedes all other rights; that the Court has to guarantee or has to take such precautionary measures to ensure that the defendant will receive a fair and impartial trial, which has always been the law of our land, and I just think that the public and the press ought to be excluded.

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Appellants' Motion To Vacate Order Closing Entire Trial To Public And Press, Including Circuit Court's Unreported Oral Order Denying Appellants' Motion To Vacate Closure Order Of September 11, 1978

The Court: Thank you, Mr. Norwood.

Before we hear from you, Mr. Bynum, I think that the record ought to show, uh, Mr. Norwood—I mean, Mr. Wellford, so that it will be in the record, uh, uh, Mr. Norwood, uh, made similar statements to that. Exactly what he said can be read if the record is ever typed up.

[19] This is the third time since it, uh, came back that we've tried to give Mr. Stevenson a trial, but one of the other points that, uh, uh, we take into consideration in this particular Courtroom is layout of the Courtroom. I think that, uh, having people in the Courtroom is distracting to the jury. Now, we have to have certain people in here and maybe that's not a very good reason. Uh, when we get into our new Court Building, uh, people can sit in the audience so that jury can't see them. Uh, the rule of the Court may be different under those circumstances, but I think that the —in order to make the record, uh, uh, some of the things that went through my mind.

I did not have a—a hearing to which, uh, you were invited, Mr. Wellford, uh, before I made the ruling. Uh, on the defendant's motion and a short [20] statement by him, and if I recall correctly, the Commonwealth didn't comment one way or the other. He may not want to comment now. Uh, I felt under the circumstances that, uh, my ruling was proper.

Mr. Bynum, do you want to comment on anything that I may have missed?

Mr. Bynum: No, sir, Your Honor.

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Appellants' Motion To Vacate Order Closing Entire Trial To Public And Press, Including Circuit Court's Unreported Oral Order Denying Appellants' Motion To Vacate Closure Order Of September 11, 1978

The Court: Uh, I think it would be very helpful, Mr. Wellford, if, uh, uh, Courts in my situation could have some guiding, uh, lights to go by. I'm inclined to agree with Mr. Norwood that, uh, if I feel that the—the, uh, rights of the defendant are infringed in any way then, uh, he makes the motion to do something and, uh, it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion.

[21] Now, I'll let you say something if you want to, but, uh, I'm just trying to make a record for you so you can do something with this if you want to.

Mr. Wellford: I have an order which I have drawn, Your Honor, denying my motion—

The Court: All right.

Mr. Wellford: —which I will tender to the Court.

The Court: Yes, sir.

Mr. Welford: Before handing it up, I would like to point out that I am not out of sympathy with what Mr. Norwood said. I view with absolute amazement trials such as the Manson trial in California where jurors are sequestered for months on end and view with amazement the fact that some of these defendants keep coming back. I think we just finished with, uh, Leslie Van Houten for the third time, but I would point out to the Court that the [22] public was there, and I've been practicising law for twenty years and what Mr. Norwood has said about the rights of the defendant has been true since before I undertook the practice of law and remains true. Certainly if the defendant does not want the public to know or information to be pub-

lished, then he can ask that the, uh, public be excluded but it very seldom is.

I can represent to the Court that the motion made by Mr. Norwood was made in Richmond within the past few weeks before Judge Wilkinson and was denied. I don't know whether the Court knows of any case in which the press has been excluded from a criminal trial or the public. I, for one, know of only two.

The Court: Yes, well, this Court excluded the public in the last capital murder trial we had. We did not exclude the press, if I [23] recall.

Mr. Wellford: I stand corrected.

The Court: But the press was present.

All right, hand that up, Mr. Baughan.

Note: Order is now being handed to the Court.

The Court: I've marked the original filed, Mr. Wellford, so that is in—before the Court.

Mr. Wellford: Thank you, Your Honor.

The Court: Mr. Wellford, I have another problem that, uh, the Clerk and I had one time before. We had a motion to, uh, uh, expunge the record, which is allowed under the new statute, and by the time we got through expunging the record, we had created more record than we had when we started.

[24]Now, uh, your motion here today, uh, I—I cannot prohibit you from immediately going upstairs. Now, whether I should prohibit you from discussing it with your clients, Richmond Newspapers, Timothy Wheeler and Kevin McCarty, I have a problem with. Uh, I don't know whether—

can Mr. Norwood or Mr. Bynum advise me, uh, should I stick my foot really far in it and put a gag rule on Mr. Wellford at this point? Now, his clients have petitioned into this suit.

Mr. Norwood: Well, Judge, I don't—

Mr. Bynum: From a practical standpoint, Your Honor, I think, uh, if the newspapers do print something, I anticipate being through tomorrow with this case and the jury—no, they wouldn't necessarily do that because you've got, uh, the Dispatch.

[25] Mr. Norwood: They can read the morning's paper. Uh, Judge, I don't believe that, uh—although I have seen instances where the Court has ordered the attorney not to discuss or relay the information to the client when it would be detrimental to some other's interest to do so, but I'm reluctant to ask the Court to order Mr. Wellford not to discuss this matter—

The Court: Yes, sir.

Mr. Norwood: —with his client, but, uh, I believe it would be infringing on Mr. Wellford's right as attorney and his client.

The Court: Yes, sir, I'm inclined to agree with you.

Mr. Wellford: I think, Your Honor, that if they don't get in, they're going to know—

The Court: Yes.

Mr. Wellford: —the actions of the Court whether I discuss it with them or not. I don't propose [26] to go into that. They knew why I was here, they've seen the motion—

The Court: Right.

Transcript Of September 11, 1978, Hearing In Hanover County Circuit Court On Appellants' Motion To Vacate Order Closing Entire Trial To Public And Press, Including Circuit Court's Unreported Oral Order Denying Appellants' Motion To Vacate Closure Order Of September 11, 1978

Mr. Wellford: —and, uh, I can tell them you denied the motion.

The Court: And if you, uh, uh, need anything from the Court, Mr. Wellford, uh, a stipulation or something in writing or something of that nature, uh, the Court will be glad to cooperate with you.

Mr. Wellford: We have no intentions of running off anywhere tonight or tomorrow. I think that, uh, normally the procedure is in these cases a Writ of Mandamus and I believe the law is if there's a continuing interest that's not mooted by the conclusion of the trial—

The Court: Yes, sir.

Mr. Wellford: —and so I would propose to allow the trial to continue in this and follow normal [27] processes. I hope the Court is not offended.

The Court: No, sir.

Mr. Wellford: We'd like to—

The Court: I'd like to be helped and we'd all like to be helped.

Mr. Wellford: Thank you.

The Court: I thank all of you gentlemen and we'll start again tomorrow morning at ten o'clock with the press and public excluded.

Mr. Norwood: Thank you, sir.

Hearing concluded at 5:20 o'clock P.M.

[Certificate of Court Reporter Omitted In Printing]

Hanover County Circuit Court's Unreported Written Order Denying Appellants' Motion To Vacate Closure Order Of September 11, 1978

VIRGINIA:

IN THE

CIRCUIT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA,

—*v.*—

JOHN PAUL STEVENSON,

Defendant.

ORDER

This day came Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy, by counsel, and filed their motion with the Court seeking vacation of the Court's order closing this trial to the public and the press, and seeking access to the courtroom during said trial.

And having reviewed a memorandum tendered with the motion, and deeming it proper so to do, the Court denies the said motion.

Enter: September 11, 1978 RICHARD H.C. TAYLOR,
Judge

Seen and objected to
ALEXANDER WELLFORD
Of Counsel

Hanover County Circuit Court's Unreported Written Order Striking Commonwealth's Evidence And, The Jury Having Been Excused, Acquitting Defendant Stevenson

VIRGINIA:

IN THE

CIRCUIT COURT FOR THE COUNTY OF HANOVER

September 12, 1978

Case No. 68-A-77

Commonwealth of Virginia
Vs. Upon an Indictment, to-wit: Murder
John Paul Stevenson

This day came the Attorney for the Commonwealth and John Paul Stevenson, who stands indicted for a felony, to-wit: Murder, as charged in the Indictment, appeared according to the condition of his recognizance, and came also C. Willard Norwood, his attorney, and also came the jury.

Whereupon, in the absence of the jury, the defendant by counsel made a Motion that a mis-trial be declared, which motion was taken under advisement.

At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which Motion was sustained by the Court.

And the jury having been excused, the Court doth find the accused NOT GUILTY of Murder, as charged in the Indictment, and he was allowed to depart.

RICHARD H.C. TAYLOR
Judge

Hanover County Circuit Court's Unreported Written Order *Nunc Pro Tunc* Granting Appellants' Written Petition To Intervene *Nunc Pro Tunc*

VIRGINIA:

IN THE

CIRCUIT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA,

—*v.*—

JOHN PAUL STEVENSON,
Defendant.

ORDER

This day came Richmond Newspapers, Inc., Timothy B. Wheeler, and Kevin McCarthy, by counsel, and filed their petition with the Court seeking leave to intervene *nunc pro tunc* September 11, 1978, in the captioned matter, for the purpose of asserting defenses to the Court's order closing the trial of the above captioned matter to the public and the press.

And having reviewed a memorandum tendered with the petition, and deeming it proper to do so, the Court grants the said petition.

Enter: September 27, 1978 RICHARD H.C. TAYLOR,
Judge

We ask for this:

ALEXANDER WELLFORD
Of Counsel

Virginia Supreme Court's Unreported Judgment Refusing Appellants' Petition For Appeal

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of July, 1979.

Record No. 781598

Richmond Newspapers, Inc., et al.,

Appellants,

against

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Hanover County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case. *Gannett Co., Inc.* v. *DePasquale,* No. 77-1301, 47 U.S.L.W. 4902 (1979).

A Copy,
Teste:
ALLEN L. LUCY, *Clerk*

By:
RICHARD R. BURIAK,
Deputy Clerk

Virginia Supreme Court's Unreported Judgment Dismissing Appellants' Petition For Writ Of Mandamus

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of July, 1979.

In Re: Richmond Newspapers, Inc., et al., Petitioners
Record No. 781599

Upon a Petition for a Writ of Mandamus

On November 8, 1978, came Richmond Newspapers, Inc., Timothy B. Wheeler and Kevin McCarthy, by counsel, and filed pleadings praying that a writ of mandamus do forthwith issue, to be directed to the Honorable Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, respondent, compelling him to grant the petitioners access to the criminal proceedings in the case of *Commonwealth of Virginia* v. *John Paul Stevenson,* and for other relief.

Also came the respondent, by counsel, and filed pleadings in opposition to the said petition.

And the court having considered the said petition and pleadings in opposition, is of opinion that the writ of mandamus should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioners the costs expended

Virginia Supreme Court's Unreported Judgment Dismissing Appellants' Petition For Writ Of Mandamus

herein. *.Gannett Co., Inc.* v. *DePasquale,* No. 77-1301, 47 U.S.L.W. 4902 (1979).

A Copy,
Teste:
ALLEN L. LUCY, *Clerk*

By:
RICHARD R. BURIAK,
Deputy Clerk

Respondent's costs:

Attorney's fee *$50.00*

Teste:

ALLEN L. LUCY, *Clerk*

By: RICHARD R. BURIAK,
Deputy Clerk

Virginia Supreme Court's Unreported Judgment Dismissing Appellants' Petition For Writ Of Prohibition

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of July, 1979.

In Re: Richmond Newspapers, Inc., et al., Petitioners
Record No. 781600

Upon a Petition for a Writ of Prohibition

On November 8, 1978, came Richmond Newspapers, Inc., Timothy B. Wheeler and Kevin McCarthy, by counsel, and filed pleadings praying that a writ of prohibition do forthwith issue, to be directed to the Honorable Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, respondent, prohibiting him from denying the petitioners access to the criminal proceedings in the case of *Commonwealth of Virginia* v. *John Paul Stevenson,* and for other relief.

Also came the respondent, by counsel, and filed pleadings in opposition to the said petition.

And the court having considered the said petition and pleadings in opposition, is of opinion that the writ of prohibition should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioners the costs expended

Virginia Supreme Court's Unreported Judgment Dismissing Appellants' Petition For Writ Of Prohibition

herein. *Gannett Co., Inc.* v. *DePasquale,* No. 77-1301, 47 U.S.L.W. 4902 (1979).

A Copy,
Teste:
ALLEN L. LUCY, *Clerk*

By:
RICHARD R. BURIAK,
Deputy Clerk

Respondent's costs:

Attorney's fee $50.00

Teste:

ALLEN L. LUCY, *Clerk*

By: RICHARD R. BURIAK,
Deputy Clerk

Richmond Times-Dispatch, Fri., March 10, 1978
Page B-1, Col. 1*

KILLINGS DENIED BY ATHEY

By Tim Wheeler
Times-Dispatch Staff Writer

Paul Jerry Athey told a Hanover County Circuit Court jury yesterday that he did not rob, rape and kill 28-year-old Ruby Diane Powell or kill her son, David, 6, in their trailer in northwestern Hanover.

In a quiet, controlled voice that broke only once, the 23-year-old machine operator told the jury that he did not remember confessing to Hanover and Goochland investigators who interviewed him at Medical College of Virginia as he was recovering from an overdose of pills.

Athey faces a possible death sentence if he is convicted of capital murder in Mrs. Powell's death.

The bodies of the mother and her child, who were stabbed and had their throats slashed, were found May 9 by Mrs. Powell's mother-in-law.

Two With Him

Athey said he had gone to the Powell trailer the evening of May 8, when authorities say the woman and child were slain. But Athey testified that an older brother, Linwood, and a cousin named Joe Lewis accompanied him to the trailer and stabbed Mrs. Powell after Jerry Athey had attempted to take a knife from Lewis. The brother and

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*Reprinted from Appendix to Appellants' Petition for Appeal to the Virginia Supreme Court at 48.

Richmond Times-Dispatch, Fri., March 10, 1978
Page B-1, Col. 1

cousin also later told him that after he fled the trailer they had stabbed the boy in the back, Athey testified.

When asked by his lawyer, J. Murray Hooker II, whether he remembered confessing to investigators from the Hanover and Goochland sheriff's departments, Athey said, "I can't recall talking to them."

Of the detailed statements the investigators say they obtained from Athey at the hospital, he said:

"I might have made them. I might not have made them. I don't know. I don't recall making them."

Athey said he had not implicated anyone else then "because I was trying to protect Joe Lewis and my brother. They told me I better not tell [that] they was going to kill me if I told."

Statement Details

Athey said he must have learned from his brother and cousin most of the details contained in the statements investigators say they obtained from him. Linwood Athey and Joe Lewis described what they had done in the trailer as the three drove away, Jerry Athey testified yesterday.

The three had driven to the [page B-8, col. 1] trailer, Athey testified, so he could take another look at an automobile he had discussed buying the day before with Mrs. Powell's husband, David Sr.

But when they arrived, Mrs. Powell told Jerry Athey her husband was gone, he testified.

While Jerry Athey was examining the car, Linwood Athey and Lewis got out of Jerry's car and apparently entered the trailer, Jerry testified, because when he looked for them, the trailer door was open.

Richmond Times-Dispatch, Fri., March 10, 1978
Page B-1, Col. 1

Inside, Athey testified, he found Mrs. Powell lying partially undressed in a bedroom, with Lewis standing with a knife at the head of the bed and with Linwood holding a gun at the foot of the bed.

"Then I asked them why they were in there, and what they were doing," Athey testified. Lewis refused to give Athey the knife he had bought the day before, he said, and cut Athey's thumb when he tried to take it.

"They told me to get the hell out of here," Athey testified.

"I Saw Joe Lewis"

"I saw Joe Lewis stab her once in the chest," Athey testified, then added that he turned and fled the trailer, pulling down a curtain as he did.

Athey also denied that he had been wearing a green leather cap on the day of the slayings, although a Goochland merchant testified Wednesday he had seen Athey wearing it. A green leather cap was later found in Mrs. Powell's bedroom.

Though he acknowledged buying the cap, Athey said his brother Linwood had been wearing it that weekend. Lewis also had a similar cap, Athey testified.

Linwood Athey and Lewis cannot be located now, Athey's defense lawyers say.

Athey also testified that the investigators had told him at least one key detail of the crime while taking his statement.

Shown Photographs

"I didn't know their throats was cut," he said, his voice breaking, when Hooker asked him about it.

Hooker also had Athey look at two black and white photographs taken after the bodies of Mrs. Powell and David

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Page B-1, Col. 1

were found, then asked Athey in succession whether he had killed, robbed, raped or cut the throats of the pair.

Though he barely glanced at the photos, Athey repeatedly said "No, no, no, no sir, no sir. . . ."

Commonwealth's Attorney Patrick R. Bynum Jr., however, is expected to hammer away at Athey's account in cross-examination to begin this morning. Bynum said yesterday that authorities already had looked into whether Athey's brother and cousin could have been involved.

Before Athey took the witness stand yesterday, the defense lawyers paraded five neighbors before the jury to attest to Athey's good reputation.

But to the surprise of Athey's attorneys, one of the character witnesses admitted on the stand that he himself was a convicted murderer who had served time in prison.

Hooker and Athey's other defense lawyer, M. Ralph Page, also complained yesterday after the hearing about the facial expression—which they termed "smirks"—of a sheriff's deputy who was stationed behind Athey while he testified.

Bynum completed the prosecution's case yesterday with testimony from a forensic scientist who identified blood stains and seminal fluid found at the scene as attributable to a person with the same blood type as Athey. Hair samples found at the scene also appeared to come from a black person, the forensic scientist testified. Athey is black, the Powells were white.

The trial is to enter its fifth day today, and Judge Richard H.C. Taylor and the lawyers indicated yesterday that the trial may continue through tomorrow, especially if the jury should convict Athey of capital murder. In that case, a second hearing would have to be held on whether to give the death sentence or life imprisonment.

Richmond Times-Dispatch, Fri., March 10, 1978
Page B-1, Col. 1

The courtroom has been empty except for participants and reporters since the trial began. Athey's relatives and all spectators have been excluded at the defense lawyers' request. Hooker indicated they feared family members might become upset enough to cause a disturbance during the trial.

Richmond News Leader, Wed., May 31, 1978
Page 59, Col. 1*

NEW TRIAL IN HANOVER IS MISTRIAL

A mistrial has been declared in the retrial on murder charges of a Baltimore man because a juror asked to be excused after the trial had begun.

Hanover Circuit Court Judge Richard H.C. Taylor yesterday granted the defense motion for a mistrial for John Paul Stevenson who, along with two others, was accused of murder in the death of Hanover hotel manager Lillian Emma Keller in 1975.

Stevenson and his brother-in-law, Howard Franklin Bittorf, were convicted of the murder in 1976, but the Virginia Supreme Court overturned their convictions while they were serving their prison terms.

A third defendant, Jeffrey A. Taylor of Ashland, was acquitted by a jury in 1976.

Yesterday, a juror asked to be excused because of a nervous condition. After she was dismissed Judge Taylor was unable to call another juror; other members of the jury pool already had been sent home. Judge Taylor declared the mistrial and reset the case for next Tuesday.

Mrs. Keller's stabbed and naked body was found Dec. 2, 1975 at the Holly Court Motel, where she was the live-in manager. A key piece of evidence in Stevenson's original conviction was a bloodstained shirt obtained from Stevenson's wife soon after the killing.

The Virginia Supreme Court, however, ruled that the shirt was entered into evidence improperly.

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*Reprinted from Appendix to Appellants' Petition for Appeal to the Virginia Supreme Court at 46.

Richmond News Leader, Wed., June 7, 1978
Page B-6, Col. 1*

MISTRIAL DECLARED IN SLAYING CASE

For the second time in a week, Hanover Circuit Court Judge Richard H. C. Taylor declared a mistrial in the case of a Baltimore man charged with a murder in Hanover. But this time neither the judge nor defense or prosecution attorneys would say why the mistrial was declared.

In fact, nearly everything about John Paul Stevenson's aborted trial was secret yesterday[.] Judge Taylor kept the courtroom closed while jurors were individually selected.

And after about an hour, when the prospective jurors were sent home and a mistrial was declared on the judge's orders, nobody would say why. "No comment" was the only comment.

Apparently, however, the mistrial declaration involved a prospective juror who had read about Stevenson's trial in a newspaper and had proceeded to tell other prospective jurors about the case before the retrial began yesterday.

Stevenson and Howard Franklin Bittorf are charged with killing Mrs. Lillian M. [*sic*] Keller, the live-in manager of the Holly Court Motel on U.S. 1 in Hanover in 1975. Stevenson and Bittorf were found guilty of second-degree murder in 1976. Stevenson was sentenced to 10 years in prison and Bittorf to 20.

But the Virginia Supreme Court overturned ther [*sic*] convictions last October and ordered new trials for both men. The court ruled the convictions were bassd [*sic*] on evidence improperly introduced during the trial.

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*Reprinted from Appendix to Appellants' Petition for Appeal to the Virginia Supreme Court at 47.

Richmond News Leader, Wed., June 7, 1978
Page B-6, Col. 1

Stevenson originally was to be retried last week, but a mistrial was declared after a jury member was excused because of a nervous condition. Stevenson now is scheduled to be tried Sept. 11 and 12. And Bittorf, whom Commonwealth's Attorney Patrick R. Bynum Jr. wants to try after Stevenson's trial, doesn't have a trial date yet.

Richmond Times-Dispatch, Sat., Aug. 5, 1978
Page B-1, Col. 3

JUDGE CERTIFIES 16 CHARGES AGAINST NORTHAMPTON WORKER

By Bill McKelway
Times-Dispatch State Staff

EASTVILLE—A Northampton County general district court judge yesterday certified 16 charges, including two for rape and one for capital murder, brought against a county laborer after barring the press from a preliminary hearing but permitting the general public to attend.

In an interview following the hearing, Judge George Willis III said he ruled to bar the press from the hearing following a motion to do so by the county commonwealth's attorney and in an effort "to prevent this case from being tried in the newspapers."

"I imagine [the press] will be able to attend the trial if it gets to the circuit court level," Willis said.

Three reporters were excluded from the hearing, but were briefed later by Commonwealth's Attorney Robert Oliver, who said defense lawyers for Morris Odell Mason agreed to support his motion.

Mason, 24, of Nassawadox is charged with the murder of two elderly women, Ursula Stevenson, 86, of Birdsnest on May 2 and Margaret K. Hand, 72, of Nassawadox on May 13.

Both women were found when their homes were burned and broken into. Mrs. Hand had been raped.

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* Reprinted from Appendix to Appellants' Petition for Appeal to the Virginia Supreme Court at 49.

Richmond Times-Dispatch, Sat., Aug. 5, 1978
Page B-1, Col. 3

Mason, a part-time employee of a chicken processing plant on the Eastern Shore, faces further charges stemming from the rape of a 12-year old girl and the attempted murder of her 13-year-old sister May 14.

Authorities arrested Mason early May 15 after he allegedly burglarized and burned the home of a third woman, living near the Chesapeake section of the county.

Oliver said he presented "six or seven" witnesses at the hearing yesterday, most of them law enforcement personnel. Other sources said most of the testimony during the three-hour hearing centered on transcripts of statements made by Mason to state police and county sheriff's deputies. Defense lawyers, Oliver said, presented no evidence at the hearing but cross-examined prosecution witnesses.

Mason was led to the county courthouse in handcuffs by four county deputies. Prior to the beginning of the hearing, deputies searched spectators and stood guard in the small courtroom.

Willis first ordered the courtroom cleared of all spectators during the testimony of one of the juvenile victims and then barred only the press from the remainder of the proceedings. The three reporters represented The Richmond Times-Dispatch, The Norfolk Virginian-Pilot and The Eastern Shore News of Accomac.

Willis ordered Mason to undergo psychiatric tests at Central State Hospital at Petersburg on May 26. Mason was returned to the county jail July 11 after being judged competent to stand trial.

Mason was paroled from the state penitentiary in April after serving 2½ years of a 10-year sentence for larceny and arson. He remains in custody in the county jail under more than $1 million bond. On Sept. 11 [a] Circuit Court

Richmond Times-Dispatch, Sat., Aug. 5, 1978
Page B-1, Col. 3

grand jury will review the charges certified yesterday against Mason. Oliver refused to comment on whether he would seek the death penalty for Mason. He said the motions to bar the press from yesterday's hearing was based partly on his desire to prevent a change of venue in the case.

Supreme Court, U. S.
FILED
SEP 14 1979
JAMES R. BROWN, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v. *Appellants,*

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v. *Appellants,*

RICHARD H. C. TAYLOR,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,

v. *Appellants,*

RICHARD H. C. TAYLOR,

Appellee.

On Appeal From The Supreme Court Of The Commonwealth Of Virginia

MOTION TO DISMISS

MARSHALL COLEMAN
Attorney General of Virginia
JERRY P. SLONAKER
Assistant Attorney General
Supreme Court—State Library Building
Richmond, Virginia 23219

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In The

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October Term, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,
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RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,
v. *Appellants,*
RICHARD H. C. TAYLOR,
Appellee.

MOTION TO DISMISS

PRELIMINARY STATEMENT

The Appellees, the Honorable Richard H. C. Taylor, Judge of the Circuit Court of Hanover County, Virginia, and the Commonwealth of Virginia, respectfully move this Court to dismiss the consolidated appeal herein for want

of jurisdiction and on the ground that Appellants' challenge to the constitutional validity of the Virginia statute concerned raises no substantial federal question.

Page number references to the appendix filed by Appellants in the Virginia Supreme Court in these consolidated cases will be designated (Va. App. . .). References to the appendix of the Appellants' Jurisdictional Statement filed herein will be designated (App. . .).

OPINIONS BELOW

The judgments of the Supreme Court of Virginia are not reported but are contained in the appendix to the Jurisdictional Statement. (App. 1a-5a).

JURISDICTION

Appellants assert that jurisdiction for their appeal to this Court is conferred by 28 U.S.C. § 1257(2). This appeal raises the question of the constitutional validity of § 19.2-266[1] of the Code of Virginia (1950), as amended, which provides that in all criminal cases in Virginia the trial court "may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

[1] The Virginia Attorney General's Office is currently drafting proposed amendments to § 19.2-266 to provide additional statutory guidance for state judges and to ensure that, as a matter of policy and state law, the tradition of public trials in Virginia is fully protected from entry of unnecessary closure orders at any stage of criminal trial proceedings. It is anticipated that these proposals will be introduced in the January 1980 session of the Virginia General Assembly.

QUESTIONS PRESENTED

I. Whether the Appellants' constitutional challenge to the validity of Virginia Code § 19.2-266 is properly before this Court when no challenge to this statute was made in the State trial court or in the Supreme Court of Virginia.

II. Whether the Appellants' attack on Virginia Code § 19.2-266 raises a substantial federal question.

STATEMENT OF THE CASE

John Paul Stevenson was convicted in the Hanover County Circuit Court on July 16, 1976 for the offense of second degree murder, but on October 7, 1977 the Supreme Court of Virginia reversed his conviction and remanded the case for a new trial. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S.E.2d 779 (1977). The conviction was reversed because a bloodstained shirt purportedly belonging to Stevenson was improperly admitted into evidence. Laboratory tests revealed that stains on the shirt matched the blood of the victim. The Virginia Supreme Court found that this shirt was improperly received in evidence at the original trial because it was "connected" to the accused solely by hearsay evidence. *Id.*[2]

The second trial of Stevenson in the Hanover County Circuit Court ended in a mistrial on May 30, 1978 (Va. App. 3), because a juror asked to be excused due to a nervous condition. (Va. App. 46). A newspaper article published by the *Richmond News Leader* the following day explained that Stevenson had been convicted before

[2] The prosecution was unable, and never attempted, to introduce the bloodstained shirt at the subsequent retrial proceedings in the Hanover County Circuit Court, but the existence of this inadmissible and highly prejudicial evidence was publicized in the newspapers. (Va. App. 46).

but that a new trial was ordered by the Virginia Supreme Court because of improper admission into evidence of a "key piece of evidence" at the original trial, which was "a bloodstained shirt obtained from Stevenson's wife soon after the killing." (Va. App. 46).

The third trial began on June 6, 1978, but that proceeding also ended in a mistrial. (Va. App. 4). That mistrial was declared because a prospective juror had read about Stevenson's previous trials and had related information to the other prospective jurors. (Va. App. 47).[3] A newspaper account published the next day stated that Stevenson had been convicted before on the murder charge but that his conviction was overturned on appeal because of evidence improperly introduced during the trial. (Va. App. 47).

The fourth trial began on September 11, 1978. At the outset Stevenson's defense counsel moved to exclude the public and press from the courtroom during the trial "because I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what." (App. 7a). The Commonwealth's Attorney did not object. (App. 7a). Appellants Wheeler and McCarthy, who were present in the courtroom, were required to leave, but the record reflects no objection on their part at that time. (App. 7a-8a). However, subsequently that same day counsel for Appellants was granted an opportunity to be heard, and he presented written and oral arguments against the exclusion order and moved the court to open the trial to the press and public. (App. 9a-10a). Appellants' counsel argued that the exclusion order was a form of prior

[3] The Appellees admitted in the proceedings below in the cases at bar that the Appellants' appendix accurately set forth what had transpired. (Attorney General's Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition at 16).

restraint on what the press could publish and as such violated First Amendment rights (App. 10a-11a), and he suggested that other measures were available to ensure a fair trial. (App. 13a). *Appellants' counsel made no mention of § 19.2-266 of the Virginia Code.*

Stevenson's defense counsel stated, "this is the fourth time that we've . . . attempted to have a trial since the beginning. . . ." (App. 15a). He continued by saying that "we've had difficulty . . . with information . . . between jurors," and "on two previous occasions Your Honor declared a mistrial and that was the reason why I wanted to avoid [continually] coming back up to this Court and . . . having to try this case." (App. 15a). Stevenson's attorney contended that a courtroom open to the press and the public would jeopardize his client's right to a fair trial and that publicity was a particular problem in that small community. (App. 15a).

In the context of all these factors existing at Stevenson's final trial in September of 1978, Judge Richard H. C. Taylor, who was presiding, noted that the courtroom layout was such that spectators tended to be distracting to the jury. (App. 16a). He also observed that the question of whether to exclude the public involved a weighing and balancing of the interests of the public and the rights of the accused. (App. 13a). Judge Taylor declined to vacate his closure order. (App. 19a).

The Appellants petitioned the Supreme Court of Virginia for writs of mandamus (App. 25a) and prohibition (App. 28a), and filed an appeal from the closure order. (App. 24a). The Virginia Supreme Court denied relief in all three cases, citing in each order this Court's recent decision in *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979). (App. 1a-5a).

The instant appeal is from those judgments of the Su-

preme Court of Virginia and attacks the constitutionality of Virginia Code § 19.2-266.

STATUTE INVOLVED

The full text of § 19.2-266 of the Code of Virginia (1950), as amended, is as follows:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.
>
> A court shall not permit the taking of photographs in the courtroom during the progress of judicial proceedings or the broadcasting of judicial proceedings by radio or television, but may authorize the use of electronic or photographic means for the perpetuation of the record or parts thereof.

ARGUMENTS

I.

The Appellants' Constitutional Challenge To The Validity Of Virginia Code § 19.2-266 Is Not Properly Before This Court, And So The Appeal Is Without The Necessary Jurisdictional Basis.

It has long been established that the Supreme Court of the United States is vested with no jurisdiction unless the federal question asserted was raised and decided in the state court below. *Crowell* v. *Randell,* 10 Peters 368, 392 (1836); *Godchaux Co.* v. *Estopinal,* 251 U.S. 179 (1919); *Jett Brothers Distilling Co.* v. *Carrollton,* 252 U.S. 1, 4-6 (1920); *Phillips* v. *United States,* 312 U.S. 246, 252-253 (1941); *Beck* v. *Washington,* 369 U.S. 541, 549-550 (1962); *Cardinale* v. *Louisiana,* 394 U.S. U.S. 437 (1969).

While an appeal may lie even though the state court is not explicit in rejecting a timely challenge to the validity of a state statute on federal grounds, the challenge itself must be explicit. *See Largent* v. *Texas,* 318 U.S. 418 (1943). Also, although a state court judgment upholding action taken under a state statute may have the effect of upholding the statute, for jurisdiction of this Court on appeal it is essential "that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings and Loan Ass'n* v. *Alderman,* 324 U.S. 182, 185 (1945). "An attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority. . . ." *Phillips* v. *United States, supra* at 252.

In a federal system it is important that state courts be given the first opportunity to consider the validity of state statutes in light of constitutional challenge, because the statutes may be construed in a way that saves their constitutionality or the issue may be resolved by the state court with an adequate state ground for denial of relief. *Cardinale* v. *Louisiana, supra* at 439. The Supreme Court of Virginia was not afforded an opportunity to consider the Appellants' constitutional challenge to Virginia Code § 19.2-266 in the cases at bar.

In *Beck* v. *Washington,* 369 U.S. 541 (1962), a Washington statute was attacked in this Court by a petition for certiorari on the ground that since the state statute permitted persons in custody to challenge grand jurors, it denied equal protection to persons not in custody who were investigated by grand juries. This Court held that the point was not properly before the Court and stated:

> Although both opinions of the Washington Supreme Court discuss the *interpretation* of [the state statute],

> neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute. The Washington Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in the trial court, even where the constitutional claims arise from the trial court's interpretation of the challenged statute. [citation omitted]. Petitioner's formal attack at the trial court level did not even mention [the state statute involved], much less argue that a restrictive interpretation would be unconstitutional under the Equal Protection Clause. *Id.* at 349-350. (emphasis in original).

Virginia procedure requires that constitutional challenges to state statutes be made in the trial court. *Rice* v. *Commonwealth,* 212 Va. 778, 188 S.E.2d 196 (1972); *King* v. *Commonwealth,* 219 Va. 171, 247 S.E.2d 368 (1978). In the cases at bar the Appellants neither challenged the constitutionality of Virginia Code § 19.2-266 in the Circuit Court of Hanover nor in the Virginia Supreme Court. Indeed, *that statute was not even discussed, cited or mentioned by Appellants,*[4] *much less challenged as being unconstitutional under the First, Sixth and Fourteenth Amendments.*[5]

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[4] See Petition for Appeal and Memorandum in Support of Petitions for Writs of Mandamus and Prohibition filed by Appellants in the Supreme Court of Virginia. Also see the Appendix to the Jurisdictional Statement. (App. 9a-19a).

[5] The record does reflect that Judge Taylor, though not citing § 19.2-266 specifically, made general reference to his statutory authority to exclude persons from the courtroom when he initially entered the closure order. (App. 7a). Also, § 19.2-266 was cited by the Attorney General of Virginia in a parenthetical of his memorandum filed in the Virginia Supreme Court in the context of his argument that the state remedy of mandamus, available to enforce non-discretionary duties, was inappropriate (Memorandum of Respondent in Opposition to Petitions for Writs of Mandamus and Prohibition at 3), and by the Commonwealth's Attorney of Hanover County, in his brief in opposition to the appeal, for the proposition that state law allowed a judge in his discretion to exclude persons from the courtroom whose presence would impair the conduct of a fair trial. (Brief in Opposition to Petition for Appeal at 5).

Accordingly, the Appellees respectfully submit that the Appellants' constitutional attack on Virginia Code § 19.2-266 is not properly before this Court, and this appeal should be dismissed for want of jurisdiction.

II.

Appellants' Challenge To Virginia Code § 19.2-266 Raises No Substantial Federal Question.

In the majority opinion of the recent decision of this Court in *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979), it was stated that the Constitution nowhere mentions any right of access to a criminal trial on the part of the public, but its guarantee of a public trial is personal to the accused. *Id.* at 2905. It was further specifically stated that "we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Id.* at 2911. The majority opinion noted that exclusion of some members of the general public from the trial itself, as opposed to a pretrial hearing, had been upheld in the past by various state and federal courts, for example, in cases involving violent crimes against minors, cases of children forced to testify to revolting facts, situations where embarrassment could prevent effective testimony or when testimony was obscene, and to maintain order in the courtroom. *Id.* at 2910 n. 19.

Mr. Justice Powell, in his concurring opinion in *Gannett,* indicated that he would hold that the press has an interest

protected by the First[6] and Fourteenth Amendments but that the right of access to courtroom proceedings is not absolute. "It is limited both by the constitutional right of defendants to a fair trial, [citation omitted], and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." *Gannett,* 99 S.Ct. at 2915 (Powell, J., concurring). Similarly, even the dissenting members of the Court in *Gannett* opined that the Constitution "does not require that all proceedings be held in open court when to do so would deprive a defendant of a fair trial." *Gannett,* 99 S.Ct. at 2936 (Blackmun, J., concurring in part and dissenting in part).

Section 19.2-266 of the Virginia Code, which Appellants contend is unconstitutional on its face and as applied, provides in pertinent part that "the court may, in its discretion, exclude from the trial any persons whose presence *would impair the conduct of a fair trial,* provided that the right of the accused to a public trial shall not be violated." (emphasis added). This statute obviously does not vest the state judge with unbridled discretion to close criminal trial proceedings.

Contrary to the assertion of the Appellants, Virginia Code § 19.2-266 was not "authoritatively interpreted" by the Virginia Supreme Court's action in these cases, especially in view of the degree of involvement of the statute in the cases and the potential for various bases and underlying reasoning for that Court's summary denial of relief. Unlike the state court decision involved in *Cox* v. *Louisiana,* 397 U.S. 536, 551 (1965), the case cited by Appellants in

[6] *But see Gannett,* 99 S.Ct. at 2918 (Rehnquist, J., concurring). "[T]his Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings. [citations omitted]." *Id.*

this regard, the Virginia Supreme Court did not define the terms of and interpret the statute, the statute was not the focus of the appeal, and there was no challenge in the Virginia courts either to the validity or construction of the Virginia statute as there was in the Louisiana courts in *Cox* to the Louisiana statute. *See State* v. *Cox,* 156 So.2d 448 (La. 1963). Also, though the Appellants claim that the Virginia statute lacks criteria to guide a state judge in exercising his discretion, the Virginia Supreme Court has not been given the opportunity to construe the statute in the face of such a challenge to it. *See Cardinale* v. *Louisiana, supra* at 439.

The Appellees fully realize, as did the majority opinion of *Gannett,* that there is a "strong societal interest in public trials." *Gannett,* 99 S.Ct. at 2907. The openness of trial proceedings may induce unknown witnesses to come forward, enhance the quality of testimony, engender more conscientious performance by trial participants, and give the general public an opportunity to observe the administration of justice. *Id.* Also, Appellees understand that the news media play an important role of informing the public about the operation of the judicial system. These are not acceptable reasons, however, for a judicial rewriting of the United States Constitution. Rather, they are considerations for state legislatures to weigh in establishing state law and policy. (See note 1, *supra*). Closure orders should be sparingly employed and reserved for extreme and unusual circumstances.

The majority opinion in *Gannett* stated that even assuming, arguendo, that the First and Fourteenth Amendments may guarantee access in some situations, "this putative right was given all appropriate deference by the state nisi prius court in the present case." *Gannett,* 99 S.Ct. at 2911-

2912.[7] The opinion noted that none of the spectators present, including the reporter employed by the Gannett Company, objected when the closure motion was made. Nevertheless, counsel for Gannett was subsequently allowed an opportunity to be heard, and the trial judge balanced the "rights" of the public and the press against those of the defendants. The judge concluded that an open proceeding would pose a reasonable probability of prejudice to the defendants. *Id.*[8]

The Appellants in the case at bar, like the news reporter in *Gannett,* did not object to the closure motion at the time it was made (App. 6a-8a) but their counsel was subsequently allowed to present written and oral arguments to the court challenging its closure order. (App. 9a-19a). In the cases at bar the criminal trial was interrupted to afford Appellants this opportunity. Also, like the New York trial judge in *Gannett,* the Virginia trial judge assumed that the public and press had a protected interest but that there must be a balancing of those interests with the right of the defendant to a fair trial (App. 13a), and both the New York judge and the Virginia judge were of the view that an open proceeding would infringe the defendant's right to a fair trial. Judge Taylor stated that "where the rights of the

[7] Mr. Justice Powell, in his concurring opinion, also concluded that the procedures followed by the state trial court in *Gannett* comported with what would be required to protect First Amendment rights. *Gannett,* 99 S.Ct. at 2917 (Powell, J., concurring).

[8] It was also observed in this context in *Gannett* that a transcript of the closed proceeding was later available. In the cases at bar, however, the Appellants contend that they have been deprived of any way of learning about what transpired at the criminal trial of John Paul Stevenson and safely reporting the facts without potential civil liability, unless they are put to the expense of requesting preparation of a transcript of Stevenson's acquittal. (Jurisdictional Statement at 10). Appellants overlook the fact that the tape recording of Stevenson's trial has been available and remains available at the Circuit Court of Hanover County.

defendant are infringed in any way...[and] he makes the motion...and...it doesn't completely override the rights of everyone else, then I'm inclined to go along with the defendant's motion." (App. 16a).[9] Accordingly, Judge Taylor adhered to his closure order. (App. 19a).

CONCLUSION

Wherefore, Appellees respectfully submit that the instant challenge to the constitutional validity of Virginia Code § 19.2-266 is not properly before the Court and presents no substantial federal question, and Appellees respectfully move the Court to dismiss this appeal.

Respectfully submitted,

MARSHALL COLEMAN
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[9] Stevenson's trial in September of 1978 was the fourth time that the Hanover County Commonwealth's Attorney had brought him to trial on the murder charge. The first trial had resulted in conviction, which was reversed on appeal because highly prejudicial but inadmissible evidence was introduced by the prosecution. *Stevenson* v. *Commonwealth, supra.* The second trial ended in a mistrial because a juror asked to be excused due to a nervous condition. (Va. App. 3, 46). A newspaper article published in the *Richmond News Leader* the following day explained that Stevenson had been convicted before but that a new trial was ordered by the Virginia Supreme Court because of improper admission into evidence of a "key piece of evidence" at the original trial, which was "a bloodstained shirt obtained from Stevenson's wife soon after the killing." (Va. App. 46). The third trial also ended in a mistrial because a prospective juror had read about Stevenson's previous trials and had related information to other prospective jurors. (Va. App. 4, 47). A newspaper account published the next day stated that Stevenson had been convicted before of the murder but that his conviction was overturned on appeal because of evidence improperly admitted during the trial. (Va. App. 47). The closure order was entered at the fourth trial.

CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel for the Appellees in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 14th day of September, 1979, I mailed, air mail postage prepaid, three copies of the foregoing Motion to Dismiss to Lawrence H. Tribe, Esquire, Griswold Hall, Harvard Law School, Cambridge, Massachusetts 02138, counsel for Appellants.

JERRY P. SLONAKER
Assistant Attorney General

Supreme Court, U. S.
FILED
SEP 22 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-243.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN McCARTHY,
APPELLANTS,
v.
COMMONWEALTH OF VIRGINIA,
APPELLEE.
(AND TWO COMPANION CASES.)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA.

Reply Brief of Appellants to Appellees' Motion to Dismiss.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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COMMONWEALTH OF VIRGINIA,
APPELLEE.
(AND TWO COMPANION CASES.)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA.

Reply Brief of Appellants to Appellees' Motion to Dismiss.

I. The Constitutional Question Presented — When, If Ever May An Entire Criminal Trial Be Closed — Is Substantial And Requires Immediate Resolution.

Expressly and exclusively on the authority of Va. Code § 19.2-266, the Hanover County Circuit Court excluded the public and press from the 1978 murder trial of John Paul Ste-

venson, acting solely on speculations that the presence of observers in the courtroom might be "distracting" to the jury, that observers and prospective witnesses might talk to each other during recesses, that information about the trial might reach persons who might be called as prospective jurors in the event of a retrial, or the catch-all — that any conceivable risk of mistrial or retrial should be eliminated through the "precautionary" expedient of a secret trial.[1] The government not only acquiesced in the closing of Stevenson's trial on these grounds and accepted the trial court's conclusion that § 19.2-266 fully authorized the closure order,[2] but also urged the same before the Virginia Supreme Court on appeal.[3]

Despite the vague and unbounded authority conferred on Virginia trial courts by § 19.2-266, despite the statute's use to hold a secret trial on a vision of dangers lacking any basis in reality — let alone any showing of imminent, unavoidable prejudice — and despite the statute's invocation with no consideration of readily available alternative measures short of secrecy,[4] the government and court below nevertheless can

[1] *See* Jurisdictional Statement ("J.S."), Appendices D and E.

[2] *Id.* at 7a, 16a.

[3] *See* Brief in Opposition to Petition for Appeal ("Opposition to Appeal") at 5-7; Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition ("Opposition to Writs") at 3, 10, 15-17.

[4] In its Motion to Dismiss ("Motion"), the government several times points out that newspaper reports following two of the Stevenson retrials publicized the existence of "highly prejudicial but inadmissible evidence" introduced by the prosecution at the first trial. *E.g.*, Motion at 13 n.9. Although the government does not say so directly, its logic implies that a secrecy order should have been entered at an even earlier stage of the case than occurred here — perhaps covering the very first trial and continuing through the appellate proceedings in which the Virginia Supreme Court first held the government's evidence inadmissible. Needless to say, following the government's rationale would require the closing of all criminal proceedings (and even the impounding of all tape recordings and transcripts) until every direct and collateral route of review and retrial had been thoroughly and finally exhausted. Such a rule is obviously unthinkable — and plainly unnecessary.

conclude that Va. Code § 19.2-266 "obviously does not vest the state judge with unbridled discretion to close criminal trial proceedings."[5] That both the government and the court

[5] Motion at 10. In acknowledging to this Court that closure orders should be "reserved for extreme and unusual circumstances," *id.* at 11, the government all but concedes the unconstitutionality of the statute's sweeping mandate. Yet the government ardently defended the closure of Stevenson's trial below, and persists in maintaining that the trial court's closure order — certainly entered under circumstances neither extreme nor unusual — was both constitutional and fully authorized by Va. Code § 19.2-266. Given the government's insistence that the closure of Stevenson's trial pursuant to § 19.2-266 was not simply authorized but was actually "justified," Opposition to Writs at 17, it is small comfort to learn that the Attorney General's Office may seek amendments to § 19.2-266 to conform the statute to its view of justifiable closure orders. Motion at 2 n.1. Even a regime under which orders closing entire trials are supposedly "reserved for extreme and unusual circumstances," *id.* at 11, would offend the Constitution, for less drastic means than secrecy will always be at hand to assure the fair conduct of a trial — at least after the jury has been impanelled. Moreover, the government's actual commitment even to the regime it espouses is belied both by its unqualified defense of the closure order in this case, and by its apparent belief that transcripts and tape recordings of secret trials are acceptable substitutes for open proceedings. Motion at 12 n.8. In any event, because the Virginia Supreme Court relied on *Gannett* to support its implicit treatment of the entire press and public as "persons whose presence would impair the conduct of a fair trial," Va. Code § 19.2-266, it seems likely that, as long as the judgments below stand, trial courts in Virginia will consider any genuine legislative curtailment of § 19.2-266 void as an infringement of the defendant's "fair trial" right, as simply codified by § 19.2-266.

Of course, no possibility of mootness can arise, nor does the Attorney General even suggest such a possibility, where the "proposed amendments" to which he refers, Motion at 2 n.1, have not yet been drafted — much less enacted — and the nature of the "guidance" he says they will offer, *id.*, remains unknown. Certainly the Attorney General's claim that the order closing Stevenson's trial was "justified," Opposition to Writs at 17, betokens no eagerness to withhold consent to motions for closure in the event that trial judges fail to follow such new statutory "guidance" — whatever it may be. The Attorney General nowhere suggests that consent to closure motions will be sparingly granted — and no such suggestion of voluntary abstinence would in any event suffice to moot this case, *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968), especially in view of

below consider *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979), such conclusive authority for their position that its mere citation should suffice below and command summary dismissal here itself demonstrates the immediate need for this Court to clarify — and, we submit, strictly confine — the meaning of *Gannett*.

II. This Case Is Properly Before This Court On Appeal.

The government would have this Court, on jurisdictional grounds, avoid reaching the merits of this appeal. In essence, the government contends that appellants, in the rush of proceedings below, did not explicitly enough voice their constitutional objections to Va. Code § 19.2-266, both on its face and as applied, to ask this Court to review the judgment below under 28 U.S.C. § 1257(2). The government's contention is without merit.[6]

The transcript of proceedings in the trial court unmistakably shows that, with the government's unquestioning assent, the trial judge entered his closure order on the sole authority of § 19.2-266 — over the constitutional objections vigorously

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the First Amendment rights at stake. This Court does not shrink from deciding constitutional issues on the hope that "[w]ell-intentioned prosecutors," *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964), will resolve constitutional ambiguities "in favor of adequate protection of First Amendment rights." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

[6]Intriguingly, on the one hand, the Attorney General insists that the court below did not construe Va. Code § 19.2-266 as authorizing the closure of Stevenson's trial, Motion at 10; on the other hand, the Attorney General reveals an intention to react to what the court below did by proposing "amendments" to Va. Code § 19.2-266 "to provide additional statutory guidance for state judges" on the subject of closure orders. Motion at 2 n.1.

asserted by appellants there and reiterated here.[7] It cannot be denied that the trial court's action fell within the literal terms of Va. Code § 19.2-266. Nor has the government ever suggested any particular narrowing construction of § 19.2-266 that would have rendered lawless the trial closing in this case or would align the statute with constitutional standards.[8] Before the Virginia Supreme Court, the government cited § 19.2-266 as sole and dispositive authority for the trial court's closure order[9] — and it was in this context that appellants un-

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[7]*See, e.g.*, Petition for Appeal at 6; J.S. at 6-7. To assert that the trial judge "made general reference to his statutory authority to exclude persons from the courtroom when he initially entered the closure order," Motion at 8 n.5, is to understate the case considerably. Upon entering his closure order in response to defense counsel's request "that everybody be excluded from the Courtroom," J.S. at 7a, the trial judge opined that "the *statute* gives me that power *specifically*," *id.* (emphases added), and cited no other source of authority for closing the trial. When the trial judge several hours later declined to vacate the closure order despite appellants' constitutional objections, he again invoked no other source of authority for closing the trial — although he did note that the exercise of such authority seemed appropriate if the trial judge "feel[s] that the . . . rights of the defendant are infringed in any way then . . . he makes the motion . . . and . . . it doesn't completely override the rights of everyone else." *Id.* at 16a. In context, the trial court was obviously ruling that the authority conferred by Va. Code § 19.2-266 — to order complete closure on defense motion — was a proper and constitutional means of avoiding even arguable infringements of the defendant's "fair trial" rights, so long as various unspecified rights of unidentified third parties are not "completely overrid[den]" by the exercise of that authority.

[8]It is therefore immaterial that "the Virginia Supreme Court did not define the terms of and [expressly] interpret the statute," Motion at 11, since no narrowing construction consistent with the Attorney General's position that the closure order in this case was "justified," see n.4 *supra*, could possibly have stripped from this statute the constitutionally objectionable power of wholesale trial closure on which this appeal rests.

[9]Again seeking to minimize "the degree of involvement of the statute," Motion at 10, the Attorney General notes only that the statute "was cited . . . in [the] brief in opposition to the appeal, for the proposition that state law allowed a judge in his discretion to exclude persons from the courtroom whose presence would impair the conduct of a fair trial." *Id.* at 8 n.5. In

ambiguously asserted their constitutional objections before the Virginia Supreme Court.[10]

In rejecting those objections, the court below obviously and necessarily decided the constitutionality of Va. Code § 19.2-266, both on its face and as applied.[11] "That is sufficient under [this Court's] practice." *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). *Cf. Eureka Lake & Yuba Canal Co.* v. *Superior Court*, 116 U.S. 410, 415-416 (1886); *Furman* v. *Nichol*, 75 U.S. (8 Wall.) 44, 55-56 (1868). The jurisdictional requirement of 28 U.S.C. § 1257(2) calls "not for some abracadabra," *Flournoy* v. *Wiener*, 321 U.S. 253, 264-265 (1944) (Frankfurter, J., dissenting), but demands instead a commonsense assessment of the questions presented to the court below in express terms and by necessary implication. And the decision of the court below warrants precisely the same form of analysis. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928). *See Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S 590, 599 (1954); *Cissna* v. *Tennessee*, 246 U.S 289, 293-294 (1918).

The Virginia Supreme Court could scarcely mistake the object of appellants' constitutional attack. Since Stevenson's trial had ended, an order admitting appellants to the trial would obviously be of no use — as the court below was forcefully reminded by the government itself.[12] Only a judgment invalidating the statute on its face or as applied could furnish a remedy — for it was the statute which remained to threaten appellants with the "recurrent phenomenon"[13] of orders closing criminal trials. Thus any ruling by the court below inescapably determined the constitutionality of Va. Code § 19.2-266; as Chief Justice Marshall said in an analogous context:

> The defendants in error deny the jurisdiction of this Court, because, they say, the record does not show that

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fact, the statute was the *only* source of authority cited in that brief, and it was cited as support not only for selectively or temporarily excluding particular persons *but as authority for expelling all observers*. Opposition to Appeal at 5, 7. Similarly, the Attorney General suggests that the statute was cited only parenthetically in the Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition. Motion at 8 n.5. In fact, however, the statute was the *only* authority in state law for the closure order cited in that Opposition, and the statute was there cited for the central proposition that mandamus would not lie inasmuch as the trial judge was to act, according to the statute, "in his discretion." Opposition to Writs at 3. *See id.* at 17.

[10] *See* Petition for Appeal and Memorandum in Support of Petitions for Writs of Mandamus and Prohibition ("Petition for Appeal") at 6.

[11] The Attorney General asserts that "Virginia procedure requires that constitutional challenges to state statutes be made in the trial court," Motion at 8, citing *King* v. *Commonwealth*, 219 Va. 171, 247 S.E. 2d 368 (1978) (per curiam); *Rice* v. *Commonwealth*, 212 Va. 778, 188 S.E. 2d 196 (1972). But unlike the accused in *King*, who evidently claimed no violation of his constitutional rights at trial, 219 Va. at 173, 247 S.E. 2d at 370, and unlike the Commonwealth in *Rice*, which raised its constitutional claim for the first time on appeal, 212 Va. at 779, 188 S.E. 2d at 197, appellants here vigorously asserted their constitutional objections to the closure order entered by the trial court pursuant to § 19.2-266 *during the trial*. J.S. at 9a-19a. *See Reid* v. *Baumgardner*, 217 Va. 769, 773, 232 S.E. 2d 778, 780 (1977) (purpose of requirement that ground of objection be specified is to give trial court opportunity to rule intelligently, and failure to specify ground of objection will be overlooked on appeal if trial judge could hardly have failed to comprehend reason why it was interposed). Moreover, notwithstanding *King* and *Rice*, the Virginia Supreme Court by its own Rule 5:21 provides that even an objection not timely asserted below — or asserted without specifying the ground of the objection — will nonetheless be entertained on appeal "to enable this Court to attain the ends of justice." The Virginia Supreme Court does not insist unwaveringly that the grounds of an objection be stated with specificity at trial "where the character of the objection is perfectly patent." *Solomon* v. *Atlantic Coast Railroad Co.*, 187 Va. 240, 243, 46 S.E. 2d 369, 370 (1948); *Smith* v. *Commonwealth*, 165 Va. 776, 781, 182 S.E. 124, 127 (1935).

In any event, a state court's power deliberately to blind itself to a federal constitutional claim necessarily presented by a pending case would itself be open to serious challenge. *Cf. Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 233-234 (1969); *Henry* v. *Mississippi*, 379 U.S. 443, 446-448 (1965).

[12] Opposition to Writs at 3-4.

[13] Petition for Appeal at 48.

the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question.

Undoubtedly the plea might have stated in terms that the act . . . was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state Court. That question must have been discussed and decided.

The plaintiffs sustain their right . . . by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.

Wilson v. *Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829).[14] It is § 19.2-266, construed by the court below to

[14]Nor would any purpose be served by adopting the government's jurisdictional argument. *See* Motion at 6-9. Undeniably, the rule requiring clear presentation of constitutional attacks on state statutes serves salutary purposes, weeding out cases of purely lawless action, cases where statutes may readily be interpreted consistent with constitutional requirements, and cases where effective remedies are available short of invalidating a statute on its face or as applied. But none of these purposes is involved or furthered here. Contrast, *e.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 434-435 (1959), dismissing an appeal but granting certiorari and reversing as violative of due process convictions for refusing to testify before a commission whose chairman had assured witnesses that the privilege against self-incrimination could be invoked as a basis for refusing to testify. Although the state supreme court in *Raley* had relied on an immunity statute to hold that no privilege of self-incrimination was available on these facts, the validity of that statute had not been challenged in the state courts, and simply reversing the conviction on due process grounds was entirely consistent with leaving the immunity statute intact both on its face and as applied.

authorize secret trials virtually on a whim, that poses a continuing threat to the rights of appellants and the public they represent. Only if this Court invalidates § 19.2-266 at least as applied here will that threat be removed and "the constitutional right of the press and public to access," *Gannett*, *supra*, 99 S.Ct. at 2916 (Powell, J., concurring), be restored.[15]

III. This Case Is Also Properly Before This Court On Certiorari.

There can be no doubt that the judgments of the court below are properly reviewable in this Court not only by appeal under 28 U.S.C. § 1257(2), but also by certiorari under 28

[15]In any event, an appeal would be proper even without the statute — since the combined effect of the trial court's order and the Virginia Supreme Court's judgments denying relief was not simply the resolution of a dispute between the parties in this litigation, or even simply the creation of a precedent for future disputes, but the establishment and enforcement of a statewide *rule of court* having the force of law in Virginia, *see* nn.16-19 *infra*, under which a defense motion unopposed by the prosecution easily suffices to shroud a full trial in secrecy. Accordingly, appellants' complaint is not simply that their constitutional rights have been violated, but that the *regime of judicial administration* put in place by the Virginia courts, pursuant to an undeniably broad reading of Va. Code § 19.2-266, has caused, and continues to threaten, serious infringement of appellants' constitutional rights of access to criminal trials. A federal constitutional challenge to such a statewide rule of court, unambiguously made but decisively rejected below, properly reaches this Court on appeal under 28 U.S.C. § 1257(2). *See*, *e.g.*, *Lathrop* v. *Donohue*, 367 U.S. 820, 824-825 (1961) (rule established by state supreme court may be statute within meaning of § 1257(2) even absent delegation of authority by legislature to establish the rule); *Mayer* v. *City of Chicago*, 404 U.S. 189, 191-193 & n.2 (1971) (rule established by court under broad legislative delegation of authority to amend statutory provisions governing criminal appeals held to be statute under § 1257(2)); *In re Griffiths*, 413 U.S. 717, 718 (1973) (rules promulgated by judges and administered by state bar are statutes within the meaning of § 1257(2)).

U.S.C. § 1257(3). *See* 28 U.S.C. § 2103. In "[f]inding no reversible error," J.S. at 1a, and thus refusing appellants' petition for appeal on the authority of *Gannett*, J.S. at 1a, the court below rendered a final judgment on the merits having the binding force of statewide precedent.[16] That ruling

[16]The Virginia Supreme Court has emphasized that the effect of a refusal of a petition for appeal "is to affirm the decree of the . . . circuit court." *Harris* v. *Battle*, (Jan. 27, 1954) (unreported opinion), reprinted in Jurisdictional Statement at 14, *Harris* v. *Battle*, 348 U.S. 803 (1954) (per curiam) (noting probable jurisdiction to review decision by Virginia Supreme Court refusing petition for appeal). *See Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (granting certiorari to review decision of Virginia Supreme Court refusing petition for appeal). See also n.17, *infra*. In Virginia, "[the] denial of an appeal acts as a judgment on the merits." A. Vanderbilt, *Minimum Standards of Judicial Administration* 399 (1949). "[A] decision to deny a petition is in reality a decision on the merits in that it represents an affirmance of the decision below." Report of the Appellate Justice Project of the National Center for State Courts 1972-1973, *The Appellate Process and Staff Research Attorneys in the Supreme Court of Virginia* 56 (1974), cited with approval in *Saunders* v. *Reynolds*, 214 Va. 697, 700-702, 204 S.E. 2d 421, 424 (1974) ("We state unequivocally that a decision to grant or refuse a petition for writ of error is based upon one equally-applied criterion — the merits of the case.").

Decisions by the Virginia Supreme Court refusing petitions for appeal or dismissing writs of error accordingly carry the binding force of statewide precedent. *E.g.*, *Cheatham* v. *Taylor*, 148 Va. 26, 138 S.E. 545 (1927) (appeal) (noting that court explains its decisions refusing petitions for appeal or dismissing writs of error in "exceptional cases" involving "main question" of "supposed novelty"); *Jones* v. *Kirby*, 146 Va. 109, 135 S.E. 676 (1926) (appeal); *Allen* v. *Commonwealth*, 114 Va. 826, 77 S.E. 66 (1913) (error); *McCue* v. *Commonwealth*, 103 Va. 870, 1001, 49 S.E. 623, 629 (1905) (error) (construing statute to apply to criminal as well as to civil proceedings). *See Mid-State Equipment Co., Inc.* v. *Bell*, 217 Va. 133, 141, 225 S.E. 2d 877, 884 (1976) (following *Cheatham*); *McCotter* v. *Carle*, 149 Va. 584, 590, 140 S.E. 670, 672 (1927) (*Jones*); *Henry* v. *Commonwealth*, 195 Va. 281, 294, 77 S.E. 2d 863, 870 (1953) (*Allen*); *Tate* v. *Commonwealth*, 155 Va. 1016, 1024, 154 S.E. 508, 511 (1930) (*McCue*) (construction of statute). Federal courts also rely on decisions of the Virginia Supreme Court refusing petitions for appeal or dismissing writs of error, *e.g.*, *Case* v. *Morisette*, 475 F. 2d 1300, 1308 & n.46, 1311 n.60 (D.C. Cir. 1973) (*Cheatham*); *DeMaurez* v. *Swope*, 104 F. 2d 758, 759 (9th Cir. 1939) (*McCue*), as do other state courts. *E.g.*, *Bouley* v. *City of Nashua*, 106 N.H. 74, 79, 205 A. 2d 34, 37 (1974) (*Cheatham*); *State* v. *Lilja*, 155 Minn. 251, 255, 193 N.W. 178, 180 (1923) (*Allen*); *People* v. *Logan*, 137 Cal. App. 2d 331, 333, 290 P. 2d 11, 12 (Ct. App. 1955) (*McCue*). Thus the Virginia Supreme Court's refusal of appellants' petition for appeal is reviewable in this Court as a final judgment of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. *See Matthews* v. *Huwe*, 269 U.S. 262, 265 (1925); *Martin* v. *City of Struthers*, 319 U.S. 141, 142 n.2 (1943); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 231-232 (1969); *id.* at 243-244 (Harlan, J., dissenting); *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Hetrick* v. *Village of Lindsey*, 265 U.S. 384, 386 (1924).

necessarily rejected appellants' constitutional objections to orders excluding the public and the press from entire criminal trials under the circumstances of this case.[17] Moreover, in dismissing appellants' petitions for writs of mandamus and prohibition, again on the authority of *Gannett*, J.S. at 2a-5a, the court below also exercised its original jurisdiction to rule on the merits against appellants' constitutional objections to Judge Taylor's closure order.[18] All three judgments are final and reviewable in this Court by appeal or by certiorari.[19]

[17]The explicit reliance on *Gannett* by the court below, J.S. at 1a, further demonstrates, in the circumstances of this case, that the federal constitutional claims pressed by appellants were disposed of on their merits. *See Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975) (fact that state courts found it necessary to attempt to distinguish a decision of this Court enunciating federal constitutional principles reveals federal basis of state courts' decisions). *Cf.* n.11 *supra*.

[18]The Virginia Supreme Court has original jurisdiction in cases of mandamus and prohibition, among others. Va. Const. art. VI, § 1; Va. Code § 17-96; Va. S. Ct. Rule 5:5. *Cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175-176 (1803).

[19]As to the judgments of the court below dismissing appellants' petitions for writs of mandamus and prohibition, the Virginia Supreme Court was not only the "highest court . . . in which a decision could be had," 28 U.S.C. § 1257; it was the *only* court. *See, e.g.*, *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) (reviewing denial of writ of prohibition); *Michigan Central Railroad Co.* v. *Mix*, 278 U.S. 492, 494 (1929) (same); *Hartman* v.

IV. Conclusion.

For the foregoing reasons, the Motion to Dismiss should be denied and this Court should note probable jurisdiction or, alternatively, should treat "the papers whereon the appeal was taken . . . as a petition for writ of certiorari . . . duly presented to the Supreme Court at the time the appeal was taken," 28 U.S.C. § 2103, and should grant certiorari.

Respectfully submitted,

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Greenhow, 102 U.S. 672, 676 (1881) (reviewing Virginia Supreme Court's denial of writ of mandamus).

The government has not suggested in this Court or in opposing the appeal below any nonfederal ground on which any of the three judgments of the Virginia Supreme Court could be upheld without reaching the federal questions presented here. Indeed, no such ground could be suggested, for none was relied upon by the Virginia Supreme Court, and it is settled that the theoretical possibility that some independent and adequate nonfederal ground might have been available, *see* Motion at 7, cannot relieve "this Court of the necessity of considering the federal question[s]" decided below. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-631 (1973); *see California* v. *Byers*, 402 U.S. 424 (1971); *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967) (per curiam); *Evans* v. *Newton*, 382 U.S. 296, 302 (1966). *Cf. Gannett*, 99 S.Ct. at 2903-2904.

Supreme Court, U. S.
FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., et al.,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

(And Two Companion Cases)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., et al.,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

(And Two Companion Cases)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF OF APPELLANTS

Opinions Below

The judgments of the Virginia Supreme Court refusing appellants' petition for appeal (A. 24a) and dismissing appellants' petitions for writs of mandamus (A. 25a) and prohibition (A. 27a), are unreported.

Jurisdiction

This is a consolidated appeal from three final judgments of the Virginia Supreme Court denying appellants, Richmond Newspapers, Inc., and two of its reporters, Timothy

B. Wheeler and Kevin McCarthy, relief from an order of the Hanover County Circuit Court, the Hon. Richard H.C. Taylor, Circuit Judge, presiding, barring the public and press from the two-day murder trial of John Paul Stevenson, held on September 11 and 12, 1978. The Circuit Court entered its closure order on the morning of September 11, 1978, at defense counsel's request, unopposed by the Commonwealth's Attorney (A. 4a), on the authority of Va. Code § 19.2-266. *See* Part I-A *infra.*

Later that day, having permitted them to intervene in the case to challenge its closure order, the Circuit Court rejected all of appellants' constitutional objections and refused to reopen the trial (A. 7a, 21a). Under the Circuit Court's closure order, the second and final day of the murder trial proceeded in secrecy to its conclusion.

On September 27, 1978, appellants filed a notice of appeal to the Virginia Supreme Court, their motion to intervene *nunc pro tunc* in the murder trial having been granted that day by the Circuit Court. On November 8, 1978, appellants filed in the Virginia Supreme Court petitions for appeal from the Circuit Court's closure order and for writs of mandamus and prohibition ensuring access to the murder trial and to future criminal trials. On July 9, 1979, citing only this Court's week-old decision in *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979), the Virginia Supreme Court refused the petition for appeal, and dismissed the petitions for writs of mandamus and prohibition.

A notice of appeal to this Court from each of those judgments was timely filed with the Clerks of the Virginia Supreme Court and the Hanover County Circuit Court (J.S. 31a-43a), on August 13, 1979, and appellants filed

their Jurisdictional Statement in this Court on August 14, 1979. On October 9, 1979, this Court postponed consideration of jurisdiction to the hearing on the merits. The jurisdiction of this Court rests both on 28 U.S.C. § 1257(2), *see* Part I-A *infra,* and on 28 U.S.C. § 1257(3). *See* Part I-B *infra.*

Questions Presented

1. Was the constitutional validity of the Virginia Closure Statute, Va. Code §19.2-266, sufficiently drawn in question to support this Court's exercise of appellate jurisdiction under 28 U.S.C. §1257(2)?

2. Do the First, Sixth, and Fourteenth Amendments to the Constitution of the United States, singly or in combination, give members of the public a judicially enforceable right of access to criminal trials that can be asserted independently of the participants in the litigation?

3. Does the Virginia Closure Statute, Va. Code §19.2-266, as construed and applied by the court below to authorize the total exclusion of the press and the public from an entire criminal trial, violate the separate and combined constitutional guarantees that criminal trials will be held in open court, accessible to the public?

4. Have the Constitution's guarantees that criminal trials will be open to the public been violated where, as in this case, all members of the press and the public were summarily expelled for the duration of a criminal trial without any factual showing or judicial finding that orderly public observation would endanger the fair trial of the

accused or any similarly transcendent concern, that conducting the trial in secret would effectively meet the concerns that led to closure, or that available procedures less drastic than secret trial—such as sequestering the jury—would not have sufficed?

Statute Involved

The text of Va. Code § 19.2-266, in pertinent part, is as follows:

> "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

Statement of the Case

When on September 11, 1978, as the murder trial of John Paul Stevenson began, the Hanover County Circuit Court granted defense counsel's request for an order clearing the courtroom of all members of the public and press, and directing that the entire trial be conducted in secret, centuries of faithful adherence under Anglo-American law to the principle of open criminal trials came to an abrupt end.

Nothing in the case portended this breathtaking result. This was not the trial of an individual marked either by great fame or by extraordinary infamy. Nor was it in any other way distinguishable from the uncounted thousands of cases previously tried in open English and American

courts. The place of trial itself was not peculiar; indeed, the courtroom of the Hanover County Circuit Court, in which Stevenson's trial was conducted, is a prototype of the American trial forum.* That the trial of an ordinary case was so casually sacrificed to secrecy dramatically underscores the truth that secret trials are a virulent "menace to liberty." *In re Oliver*, 333 U.S. 257, 269 (1948).

The facts in this case sharply contradict a basic assumption expressed by this Court in *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979): that the right of public access to criminal trials will be steadfastly championed by the prosecutor and trial judge if not by the accused himself. Defense counsel waived Stevenson's right to a public trial not to prevent some unusual and otherwise unavoidable form of prejudice, but merely "because I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what" (A. 5a). Defense counsel's closure motion drew no objection from the Commonwealth's Attorney, who was content to "leave it to the discretion of the Court" (A. 6a), in response to which the trial court agreed that "the [closure] statute gives me that power specifically" (*Id.*). Then, without further consideration of the issues, without any factual inquiry whatever, and without any finding of necessity, efficacy, or lack of alternatives, the trial court summarily ordered that, since "the defendant has made the motion," "I'll rule that the Courtroom be kept clear of all parties except the wit-

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* A diagram and a photograph of the courtroom involved in this case appear in this brief as Exhibits A and B, respectively. That these exhibits, which were not before the court below, accurately portray the trial courtroom has been stipulated by the parties. A copy of that stipulation has been filed with this Court.

nesses when they testify" (*Id.*). The murder trial then proceeded in secrecy to its amazing conclusion.

Among those immediately ousted from the courtroom when the closure motion was granted were appellants Wheeler and McCarthy, reporters for appellant Richmond Newspapers, Inc., parent of two local newspapers. As soon as counsel could be consulted, appellants sought a hearing on a motion to vacate the trial court's order and to reopen the trial. The trial court scheduled a hearing on the motion to follow the close of the day's proceedings—even though the trial, scheduled months earlier to last just two days (A. 36a), would by then be half over.

When the reporters appeared for the afternoon hearing with counsel, the trial court ordered them to leave the courtroom—even though theirs were the rights at issue in the hearing—stating that "we have to treat this . . . as a part of the original trial that we're in" (A. 8a). The trial court acknowledged to appellants' counsel that excluding the reporters "is going to . . . increase your position in your motion, but I . . . ruled that the Courtroom had to be cleared and I'm going to have to ask the reporters to leave at this time, too" (*Id.*). No justification for their exclusion from the hearing was offered, and none suggests itself—other than the trial court's arbitrary determination to conduct every aspect of the trial outside the public's view.

Counsel for appellants immediately challenged the constitutionality of the court's asserted power to issue the closure order. Characterizing that order as a "novel form of censorship" that violated the First, Sixth and Fourteenth Amendments to the Constitution, counsel vigorously and unambiguously objected to the trial court's failure to make any "evidential finding" that a fair trial would be

jeopardized by the presence of orderly members of the public (A. 10a, 12a). Counsel further argued that, even if such jeopardy might be shown, the trial could would be constitutionally required to conclude, before ordering closure, that "sequestration of the jury or changes of venue" (*id.*), or other "alternatives which might protect the defendant's rights" (A. 13a), were unavailable or could not safeguard the rights of the accused. Contrasting the New York Court of Appeals' decision in *Gannett Co., Inc.* v. *DePasquale,* 43 N.Y.2d 370, 372 N.E.2d 544 (1977), counsel for appellants also emphasized that the exclusion of the press from a *pre*trial hearing was not at issue (A. 9a, 11a).

Counsel for defendant responded by alluding cryptically to "difficulty . . . with information . . . between the jurors" (A. 14a), and letting "information . . . leak out" through the press back to the jury in this "small community" (A. 15a). Counsel indicated that a different rule might apply "in a big city where you've got three hundred thousand people" (*Id.*). Defendant's counsel asserted that "[t]here's no way" a court can shield jurors from news about a trial (*id.*), and insisted that the accused's right to a fair and impartial trial "supersedes all other rights" (*Id.*).

Having heard these arguments, the trial court offered its own impression that, given the court's "layout," "having people in the Courtroom is distracting to the jury" (A. 16a). The court added that "maybe that's not a very good reason" to close a trial (*Id.*). The court also noted that three previous attempts to try the defendant had failed (*id.*),[1] and expressed the view that, this time, every

[1] In July 1976, defendant John Paul Stevenson was convicted in the Hanover County Circuit Court of the second-degree murder of a local hotel manager. In October 1977, the Virginia Supreme Court reversed his conviction and remanded the case for a new trial, holding that certain evidence introduced against him at trial was inadmissible. *Stevenson* v. *Commonwealth,* 218 Va. 462, 237

step should be taken to assure that "the . . . rights of the defendant are [not] infringed in any way . . ." (A. 17a). The court then stated that it was "inclined to go along with the defendant's motion" (*Id.*).

The trial continued in secret the next day. What transpired may only be inferred from a one-page order signed by the trial judge on September 12, 1978 (A. 22a). That order indicates that the defendant moved unsuccessfully for a mistrial—although there is no hint of the grounds for the motion, and no clue as to why the court neither granted nor otherwise disposed of it.[2] The order also states that, at the close of the Commonwealth's case, defense counsel moved to strike the Commonwealth's evidence "on grounds stated to the record" (*Id.*). Again, the substance of these grounds remains secret. The order does report that the motion was sustained—but the reason, once again, is not supplied. Thus, in the midst of the defendant's fourth trial, in 1978, for a murder allegedly committed in 1976, the trial court, having stricken the case against him, declared the accused "not guilty of murder, as charged in the indictment, and he was allowed to

S.E. 2d 779 (1977). In May 1978, Stevenson's retrial before appellee Taylor ended in a mistrial when a juror asked to be excused after the trial had begun and no alternate juror was available. *Richmond News Leader,* May 31, 1978, at 59, col. 1 (A. 34a). In June 1978, Stevenson's second retrial, again before appellee Taylor, also ended in mistrial. *Richmond News Leader,* June 7, 1978, at B-6, col. 1 (A. 35a). Neither appellee Taylor, nor defense counsel, nor the prosecution would say why the mistrial had been declared *(Id.)*. According to one account, "the mistrial declaration involved a prospective juror who had read about Stevenson's trial in a newspaper and had proceeded to tell other prospective jurors about the case before the trial began yesterday" *(Id.)*.

[2] It is clear that much may sometimes turn, for purposes of double jeopardy, on why a mistrial is declared or denied. *See, e.g., Arizona* v. *Washington,* 434 U.S. 497 (1978); *Illinois* v. *Somerville,* 410 U.S. 458 (1973); *United States* v. *Jorn,* 400 U.S. 470 (1971).

depart" (*Id.*). The next morning's newspapers could report only that the defendant had been set free.[3]

Summary of Argument

I.

For centuries, it has been an axiom of every just society that the people may enter freely into its halls of justice. The right to attend and observe criminal trials was taken for granted by our Constitution's Framers as well. No single provision of the Constitution expressly and unambiguously confers that right, but each of several provisions plainly implies it, and its existence is demonstrably entailed by those provisions' interrelated meaning and structure.

A guarantee that criminal trials will be open to orderly public attendance and observation is, first of all, implicit in the First Amendment. That the freedoms of speech and press include the freedom to observe and learn, and not only the freedom to talk and publish, is beyond doubt. Self-government presupposes knowledge; and knowledge of the administration of justice lies at the core of any society dedicated to the rule of law.

Although the First Amendment does not unseal government records or unlock private files, its central meaning requires that people remain free to seek understanding and information in those forums that have traditionally been open *to* the public, at least when their function depends vitally upon access *by* the public. This nation's

[3] To say much more in such circumstances, on the basis of interviews with jurors, witnesses, or the parties, could well expose the press to crippling liability. *See Wolston* v. *Reader's Digest Ass'n, Inc.,* 99 S. Ct. 2701, 2707-08 (1979) (one does not become a public figure, for purposes of comment regarding a jury verdict, by becoming involved in a criminal trial).

courthouses are the clearest illustration: open from the beginning, and unable, if sealed from view, to fulfill their mission of displaying as well as doing justice.

The case for a First Amendment right of access to *criminal* trials is uniquely strong, for such trials are public by constitutional command. Even if the Sixth Amendment were thought to confer only on the accused the right to demand a public trial, the very fact that the accused has that right automatically removes criminal trials from the realm of proceedings the state is free unilaterally to treat as wholly internal and confidential, and from the realm of places that the state is empowered unilaterally to cordon off. In this special context, it matters not that the freedoms of speech and press are being invoked against the wishes of the trial's participants: since it is settled that the accused has no right to demand a secret trial, government's action making it secret is simply a form of censorship.

Entirely apart from the First Amendment, the Sixth confers standing on members of the public to invoke the public trial guarantee. No one doubts that the constitutional norm of open trials does more than protect defendants from oppression. It also protects the public from prosecutorial and judicial malfeasance and ineptitude. Because the public's interest in enforcing the Sixth Amendment's public trial clause is independent of, and often conflicts with, the perceived self-interest of the participants in a trial, vindicating that public interest requires recognizing standing for members of the public who have been denied access. Doing so not only serves the purposes of the Sixth Amendment; it also fully meets this Court's constitutional and prudential tests for determining who may assert a claim under the Constitution.

Nor is the norm of open trials one that could better be vindicated politically than judicially. Like the right to vote or the right to speak, the right to watch silently the operation of our courts must be held securely beyond the reach of pluralist interest-group compromise.

Although dicta in the majority opinion in *Gannett* point in a different direction, nothing this Court has ever held—not even in *Gannett*—either requires or implies that the public trial clause is unavailable to persons ejected from a criminal trial at the behest of its participants. *Gannett*, as the majority noted and the Chief Justice stressed, involved only *pre*trial suppression hearings. To find no public right of access to such proceedings under the Sixth Amendment says nothing about access to trials as such, since both in history and in purpose suppression hearings and criminal trials are poles apart. The aim of the first is to keep *inadmissible* information *from* the jury; of the second, to present *admissible* information *to* the jury—and to the community that the jury represents. It is only in the context of the pretrial suppression hearing that openness and fairness are in tension. At trial, where a battery of devices may be deployed to keep any improper evidence from the jury, the two norms converge—even though the personal interests of the accused, the accuser, or the judge may at times be advanced by concealment.

Thus the Sixth Amendment, like the First, guarantees that criminal trials will be open to public attendance and observation. But even if the inference from these two texts seemed problematic, a judicially enforceable norm of open trials would follow from the role such trials play in the Anglo-American regime of ordered liberty and in our Nation's history and traditions. Like the right to vote, which the Constitution does not expressly mention, the

right to attend criminal trials is fundamental because it preserves all other rights. And, like the right to demand proof of guilt beyond reasonable doubt, the right to observe criminal trials is constitutionally protected because it is indispensable to public confidence in the legal system. Plainly, the time-honored right to observe criminal prosecutions in progress was among the rights "retained by the people" when the Constitution was adopted.

II.

Given its indispensable role in preserving an open society, the right to attend criminal trials can be limited only to the degree that it unavoidably clashes with some equally transcendent value. Since the tension between the constitutional norms of open and fair trials ceases the moment a trial begins, closing a criminal trial to the public can almost never be justified. To accommodate the extraordinary case in which some justification may exist, without inviting a plethora of mistaken or ill-motivated closures, it is crucial to adopt a set of stringent procedural and substantive safeguards—a set of safeguards that would contrast starkly with Virginia's Closure Statute, which delegates to trial courts practically unbridled authority summarily to expel all observers from an entire criminal trial on the indefensible premise that the very presence of observers may stand in the way of fairness.

Having been construed to permit secret trials even when secrecy is not demonstrably required to avoid unfair prosecution or any other grave evil—even when less drastic alternatives could do as well, and even when the efficacy of secrecy itself is dubious—the Virginia statute that was invoked to expel appellants from the trial of John Paul Stevenson is plainly unconstitutional.

III.

Independent of the statute's constitutional infirmities, it is clear that appellants' expulsion from the Stevenson trial was both procedurally and substantively incompatible with the First, Sixth, and Fourteenth Amendments. No adversary hearing on closure was held until the secret trial was half over, and nothing disclosed at that hearing could remotely have justified closing the entire trial. Even if taken seriously, defense counsel's vague worries about such risks as that of jurors reading newspapers overnight could at most have justified sequestration. But when counsel for appellants suggested that option, the parties to the trial simply changed the subject. Ultimately, the only reason the trial court gave for banishing all observers for the duration of the proceedings was that the public's presence might distract the jury—an astonishing rationale strikingly incompatible with the centuries-old norm of public trials, and with an unbroken tradition of open trials in this very courthouse since its construction in 1735.

That so unexceptional a case as John Paul Stevenson's could have provided the occasion for so extraordinary and so blatantly unconstitutional an exercise of censorial power illustrates the enormous danger of closure authority and demonstrates the necessity for erecting a barrier of safeguards so sturdy that litigants seeking to close an entire criminal trial will never surmount it without irresistible justification. Our very survival as an open society requires no less.[4]

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[4] Appellants seek review on appeal, 28 U.S.C. § 1257(2), because the closure order entered below represented not a lawless aberration but a quite literal application of Va. Code § 19.2-266, which invites the state's trial courts, "in [their] discretion, [to] exclude from . . . trial" any and all observers, however orderly, on the theory that their "presence would impair the conduct of a fair trial." The trial court based its closure order exclusively on that

I.

This Case Is Properly Before This Court Both on Appeal and on Certiorari.

A. This Case Is Properly Before This Court on Appeal.

The state would have this Court, on jurisdictional grounds, avoid reaching the merits of this appeal. The state contends that appellants did not explicitly enough voice their constitutional objections to Va. Code § 19.2-266, both on its face and as applied, to afford the Virginia Supreme Court "an opportunity" to construe the statute "in a way that saves [its] constitutionality," Motion to Dismiss ("Motion") at 7, and thus that appellants may not ask this Court to review the judgments below under 28 U.S.C. § 1257(2). The state's contention is without merit.[5]

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statute, and the state relied solely on the statute to convince the Virginia Supreme Court to show that the order was authorized by state law. Inasmuch as appellants have from the outset argued that the assertion of such closure authority violates the First, Sixth, and Fourteenth Amendments, only a willful blindness could have prevented the court below from recognizing that there was "drawn in question the validity" of the closure statute, both facially and as the sole source of appellants' expulsion from criminal trials in the state. In these circumstances, the Virginia Supreme Court's rejection of appellants' constitutional claims was beyond doubt a decision "in favor of [the] validity" of Va. Code § 19.2-266.

In any event this case is of course properly before the Court at least on certiorari, 28 U.S.C. § 1257(3), *see* 28 U.S.C. § 2103, since the state's highest court, in refusing appellants' requests for original writs of mandamus and prohibition, and in refusing appellants' petition for appeal—all on the sole authority of *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979)—rejected on the merits the First, Sixth, and Fourteenth Amendment objections that appellants have from the beginning pressed against the state's asserted authority to expel appellants, and all other members of the public, from criminal trials in Virginia.

[5] Intriguingly, on the one hand the Attorney General insists that the court below did not construe Va. Code § 19.2-266 as authorizing

The transcript of proceedings in the trial court unmistakably shows that, with the state's unquestioning assent, the trial court entered its closure order on the sole authority of § 19.2-266—over the constitutional objections vigorously pressed by appellants there and reiterated here.[6] It cannot be denied that the trial court's action, treating all members of the press and public as "persons whose presence would impair the conduct of a fair trial," Va. Code § 19.2-266, fell within the literal terms of that statute. Nor has the state ever suggested any particular narrowing construction of § 19.2-266 that would have rendered lawless the trial closing in this case or would align the

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the closure of Stevenson's trial, Motion to Dismiss ("Motion") at 10; on the other hand the Attorney General reveals an intention to react to what the court below did by proposing "amendments" to Va. Code § 19.2-266 "to provide additional statutory guidance for state judges" on the subject of closure orders. Motion at 2 n.1.

[6] *See, e.g.*, Petition for Appeal at 6. To assert that the trial court "made general reference to his statutory authority to exclude persons from the courtroom when he initially entered the closure order," Motion at 8 n.5, is to understate the case considerably. Upon entering his closure order in response to defense counsel's request "that everybody be excluded from the Courtroom" (A. 5a), the trial judge opined that "the *statute* gives me that power *specifically*" (A. 6a) (emphasis added), and cited no other source of authority for closing the trial.

When the trial judge several hours later declined to vacate the closure order despite appellants' constitutional objections, he again invoked no other source of authority for closing the trial—although he did note that the exercise of such authority seemed appropriate if the trial judge "feel[s] that the . . . rights of the defendant are infringed in any way then . . . he makes the motion . . . and . . . it doesn't completely override the rights of everyone else" (A. 17a). In context, the trial court was obviously ruling that the authority conferred by Va. Code § 19.2-266—to order complete closure on unopposed defense motion—was a proper and constitutional means of avoiding even arguable infringements of the defendant's "fair trial" rights, so long as the exercise of that authority does not "completely override" various unspecified rights of unidentified third parties.

statute with constitutional standards.[7] Indeed, before the Virginia Supreme Court, the state itself cited § 19.2-266 as sole and dispositive authority for the trial court's closure order[8]—and it was in this context that appellants unambiguously asserted their constitutional objections before the Virginia Supreme Court.[9]

In rejecting those objections, the court below obviously and necessarily decided the constitutionality of Va. Code § 19.2-266, both on its face and as applied.[10] "That is sufficient under [this Court's] practice." *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). *See Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S. 590, 599 (1954); *Cissna* v. *Tennessee*, 246 U.S. 289, 293-294 (1918). The jurisdictional requirement of 28 U.S.C. § 1257(2) calls "not for some abracadabra," *Flournoy* v. *Wiener*, 321 U.S. 253, 264-265 (1944) (Frankfurter, J., dissenting), but demands instead a commonsense assessment of the questions presented to the court below in express terms and by necessary implication. And the decision of the court below warrants precisely

[7] It is therefore immaterial that "the Virginia Supreme Court did not define the terms of and [expressly] interpret the statute," Motion at 11, since no narrowing construction consistent with the Attorney General's position that the closure order in this case was "justified," see Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition ("Opposition to Writs") at 17, could possibly have stripped from this statute the constitutionally objectionable power of wholesale trial closure on which this appeal rests.

[8] Again seeking to minimize "the degree of involvement of the statute," Motion at 10, the Attorney General notes only that the statute "was cited . . . in [the] brief in opposition to the appeal, for the proposition that state law allowed a judge in his discretion to exclude persons from the courtroom whose presence would impair the conduct of a fair trial." *Id.* at 8 n.5. In fact, the statute was the *only* source of authority cited in that brief, and it was cited as support not only for selectively or temporarily excluding particular persons *but as authority for expelling all observers.* Brief in Opposition to Petition for Appeal ("Opposition to Appeal") at 5, 7.

Similarly, the Attorney General suggests that the statute was cited only parenthetically in the Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition. Motion at 8 n.5. In fact, however, the statute was the *only* authority in state law for the closure order cited in that Opposition, and the statute was there cited for the central proposition that mandamus would not lie inasmuch as the trial judge was to act, according to the statute, "in his discretion." Opposition to Writs at 3. *See id.* at 17.

[9] *See* Petition for Appeal and Memorandum in Support of Petitions for Writs of Mandamus and Prohibition ("Petition for Appeal") at 6.

[10] The Attorney General has cited two inapposite Virginia cases for the proposition that "Virginia procedure requires that constitutional challenges to state statutes be made in the trial court," Motion at 8, citing *King* v. *Commonwealth*, 219 Va. 171, 247 S.E. 2d 368 (1978) (per curiam); *Rice* v. *Commonwealth*, 212 Va. 778, 188 S.E. 2d 196 (1972). Unlike the accused in *King*, who evidently claimed no violation of his constitutional rights at trial, 219 Va. at 173, 247 S.E. 2d at 370, and unlike the Commonwealth in *Rice*, which raised its constitutional claim for the first time on appeal, 212 Va. at 779, 188 S.E. 2d at 197, appellants here vigorously asserted their constitutional objections to the closure order entered by the trial court pursuant to § 19.2-266 *during the trial.* Moreover, notwithstanding *King* and *Rice*, the Virginia Supreme Court by its own Rule 5:21 provides that even an objection not timely asserted below—or asserted without specified grounds—will nonetheless be entertained on appeal "to enable this Court to attain the ends of justice." *Cf. Archer* v. *Mayes*, 213 Va. 633, 641, 194 S.E. 2d 707, 712-13 (1973) (contention advanced for first time on appeal will be considered, "because it raises a question of considerable appeal"). *See also Reid* v. *Baumgardner*, 217 Va. 769, 773, 232 S.E. 2d 778, 780 (1977) (purpose of requirement that ground of objection be specified is to give trial court opportunity to rule intelligently, and failure to specify ground of objection will be overlooked on appeal if trial judge could hardly have failed to comprehend reason why it was interposed). In addition, the Virginia Supreme Court does not insist unwaveringly that the grounds of an objection be stated with specificity at trial "where the character of the objection is perfectly patent." *Solomon* v. *Atlantic Coast Railroad Co.*, 187 Va. 240, 243, 46 S.E. 2d 369, 370 (1948); *Smith* v. *Commonwealth*, 165 Va. 776, 781, 182 S.E. 124, 127 (1935). In any event, a state court's power deliberately to blind itself to a federal constitutional claim necessarily presented by a pending case would itself be open to serious challenge. *Cf. Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 233-234 (1969); *Henry* v. *Mississippi*, 379 U.S. 443, 446-448 (1965).

the same form of analysis. New York *ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63 (1928). *Cf. Eureka Lake & Yuba Canal Co.* v. *Superior Court,* 116 U.S. 410, 415-416 (1886); *Furman* v. *Nichol,* 75 U.S. (8 Wall.) 44, 55-56 (1868).

The Virginia Supreme Court could scarcely mistake the object and substance of appellants' constitutional attack. Since Stevenson's trial had ended, an order simply purporting to admit appellants to that trial—or to others exactly like it—would obviously be of no use, as the court below was forcefully reminded by the state itself.[11] Appellants therefore sought relief below from the "recurrent phenomenon" [12] of orders closing entire criminal trials—orders entered on the remarkable premise that all observers could be "persons whose presence would impair the conduct of a fair trial." Va. Code § 19.2-266. By asking the court below for a determination that such closure orders are necessarily repugnant to the First, Sixth, and Fourteenth Amendments, appellants have manifestly "drawn in question the validity of a statute" as required by 28 U.S.C. § 1257(2): Va. Code § 19.2-266, which expressly authorizes precisely such orders, and which was the sole authority invoked for the closure order entered in this case. Since the state squarely rested its opposition to the relief sought below by appellants on the express authority of Va. Code § 19.2-266,[13] the Virginia Supreme Court's rulings against appellants necessarily represented a "decision in favor of [the] validity" of that statute. *See* 28 U.S.C. § 1257(2). As Chief Justice Marshall said in an analogous context:

[11] Opposition to Writs at 3-4.

[12] Petition for Appeal at 48.

[13] *See* n.8 *supra.*

> The defendants in error deny the jurisdiction of this Court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question.
>
> Undoubtedly the plea might have stated in terms that the act . . . was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state Court. That question must have been discussed and decided.
>
> The plaintiffs sustain their right . . . by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.

Willson v. *Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 249 (1829).[14] It is § 19.2-266, construed by the court

[14] Nor would any purpose be served by adopting the state's jurisdictional argument. Undeniably, the rule requiring clear presentation of constitutional attacks on state statutes serves salutary purposes, weeding out cases of purely lawless action, cases where statutes may readily be interpreted consistent with constitutional requirements, and cases where effective remedies are available short of invalidating a statute on its face or as applied. But none of these purposes is involved or furthered here. *Contrast, e.g., Raley* v. *Ohio,* 360 U.S. 423, 434-435 (1959), dismissing the appeal but granting certiorari and reversing as violative of due process several convictions for refusing to testify before a state commission whose chairman had assured witnesses that the privilege against self-incrimination could be invoked as a basis for refusing to testify. Although the state supreme court in *Raley* had relied on an immunity statute to hold that no privilege of self-incrimination was

below to authorize secret trials virtually on a whim, that poses a continuing threat to the rights of appellants and the public they represent. Only if this Court holds that open criminal trials cannot be sacrificed—a holding that would, in effect, invalidate § 19.2-266 as applied here—will the threat of impermissible trial closings be removed and "the constitutional right of the press and public to access," *Gannett,* 99 S.Ct. at 2916 (Powell, J., concurring), be restored.[15]

available on these facts, the validity of that statute had not been challenged in the state courts, and simply reversing the conviction on due process grounds was entirely consistent with leaving the immunity statute intact both on its face and as applied.

[15] In any event, an appeal would be proper even without the statute—since the combined effect of the trial court's order and the Virginia Supreme Court's judgments denying relief was not simply the resolution of a dispute between the parties in this litigation, or even simply the creation of a precedent for future disputes, but the establishment and enforcement of a statewide *rule of court* having the force of law in Virginia, *see* nn.16-19, *infra,* under which a defense motion unopposed by the prosecution easily suffices to shroud a full trial in secrecy. Accordingly, appellants' complaint is not simply that their constitutional rights have been violated, but that the *regime of judicial administration* put in place by the Virginia courts, pursuant to an undeniably broad reading of Va. Code § 19.2-266, has caused, and continues to threaten, serious infringement of appellants' constitutional rights of access to criminal trials. A federal constitutional challenge to such a statewide rule of court, unambiguously made but decisively rejected below, properly reaches this Court on appeal under 28 U.S.C. § 1257(2). *See, e.g., Lathrop* v. *Donohue,* 367 U.S. 820, 824-825 (1961) (rule established by state supreme court may be statute within meaning of § 1257(2) even absent delegation of authority by legislature to establish the rule); *Mayer* v. *City of Chicago,* 404 U.S. 189, 191-193 & n.2 (1971) (rule established by court under broad legislative delegation of authority to amend statutory provisions governing criminal appeals held to be statute under § 1257(2)); *In re Griffiths,* 413 U.S. 717, 718 (1973) (rules promulgated by judges and administered by state bar are statutes within the meaning of § 1257(2)).

B. This Case Is Also Properly Before This Court on Certiorari.

There can be no doubt that the judgments of the court below are properly reviewable in this Court not only on appeal under 28 U.S.C. § 1257(2), but also on certiorari under 28 U.S.C. § 1257(3). *See* 28 U.S.C. § 2103. In "[f]inding no reversible error" (A. 24a), and thus refusing appellants' petition for appeal on the authority of *Gannett* (*id.*), the court below rendered a final judgment on the merits having the binding force of statewide precedent.[16]

[16] The Virginia Supreme Court has emphasized that the effect of a refusal of a petition for appeal "is to affirm the decree of the . . . circuit court." *Harris* v. *Battle,* (Jan. 27, 1954) (unreported opinion), reprinted in Jurisdictional Statement at 14, *Harris* v. *Battle,* 348 U.S. 803 (1954) (per curiam) (noting probable jurisdiction to review decision by Virginia Supreme Court refusing petition for appeal). *See Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969) (granting certiorari to review decision of Virginia Supreme Court refusing petition for appeal). *See also* n.16, *infra.* In Virginia, "[the] denial of an appeal acts as a judgment on the merits." A. Vanderbilt, *Minimum Standards of Judicial Administration* 399 (1949). "[A] decision to deny a petition is in reality a decision on the merits in that it represents an affirmance of the decision below." Report of the Appellate Justice Project of the National Center for State Courts 1972-1973, *The Appellate Process and Staff Research Attorneys in the Supreme Court of Virginia* 56 (1974), cited with approval in *Saunders* v. *Reynolds,* 214 Va. 697, 700-702, 204 S.E. 2d 421, 424 (1974) ("We state unequivocally that a decision to grant or refuse a petition for writ of error is based upon one equally-applied criterion—the merits of the case.").

Decisions by the Virginia Supreme Court refusing petitions for appeal or dismissing writs of error accordingly carry the binding force of statewide precedent. *E.g., Cheatham* v. *Taylor,* 148 Va. 26, 138 S.E. 545 (1927) (appeal) (noting that court explains its decisions refusing petitions for appeal or dismissing writs of error in "exceptional cases" involving "main question" of "supposed novelty"); *Jones* v. *Kirby,* 146 Va. 109, 135 S.E. 676 (1926) (appeal); *Allen* v. *Commonwealth,* 114 Va. 826, 77 S.E. 66 (1913) (error); *McCue* v. *Commonwealth,* 103 Va. 870, 1001, 49 S.E. 623, 629 (1905) (error) (construing statute to apply to criminal as well as to civil proceedings). *See Mid-State Equipment Co., Inc.* v. *Bell,* 217 Va. 133, 141, 225 S.E. 2d 877, 884 (1976) (following

That ruling necessarily rejected appellants' constitutional objections to orders excluding the public and the press from entire criminal trials.[17] Moreover, in dismissing appellants' petitions for writs of mandamus and prohibition, again on the authority of *Gannett* (A. 26a, 28a), the court below also exercised its original jurisdiction to rule on the merits against appellants' constitutional objections to

Cheatham); *McCotter* v. *Carle*, 149 Va. 548, 590, 140 S.E. 670, 672 (1927) *(Jones)*; *Henry* v. *Commonwealth*, 195 Va. 281, 294, 77 S.E. 2d 863, 870 (1953) *(Allen)*; *Tate* v. *Commonwealth*, 155 Va. 1016, 1024, 154 S.E. 508, 511 (1930) *(McCue)* (construction of statute).

Federal courts also rely on decisions of the Virginia Supreme Court refusing petitions for appeal or dismissing writs of error, *e.g.*, *Case* v. *Morisette*, 475 F. 2d 1300, 1308 & n.46, 1311 n.60 (D.C. Cir. 1973) *(Cheatham)*; *DeMaurez* v. *Swope*, 104 F. 2d 758, 759 (9th Cir. 1939) *(McCue)*, as do other state courts. *E.g.*, *Bouley* v. *City of Nashua*, 106 N.H. 74, 79, 205 A. 2d 34, 37 (1974) *(Cheatham)*; *State* v. *Lilja*, 155 Minn. 251, 255, 193 N.W. 178, 180 (1923) *(Allen)*; *People* v. *Logan*, 137 Cal. App. 2d 331, 333, 290 P. 2d 11, 12 (Ct. App. 1955) *(McCue)*.

Thus the Virginia Supreme Court's refusal of appellants' petition for appeal is reviewable in this Court as a final judgment of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. *See Foster* v. *County School Board*, No. 79-13, 48 U.S.L.W. 3216 (U.S. Oct. 10, 1979), *dismissing for want of a substantial federal question an appeal from* No. 790029 (Va. Sup. Ct. Apr. 6, 1979), *refusing without opinion a petition for appeal from* Law No. 9299 (Cir. Ct. Oct. 10, 1978); *Matthews* v. *Huwe*, 269 U.S. 262, 265 (1925); *Martin* v. *City of Struthers*, 319 U.S. 141, 142 n.2 (1943); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 231-232 (1969); *id.* at 243-244 (Harlan, J., dissenting); *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Hetrick* v. *Village of Lindsey*, 265 U.S. 384, 386 (1924).

[17] The explicit reliance on *Gannett* by the court below (A. 24a) further demonstrates, in the circumstances of this case, that the federal constitutional claims pressed by appellants were disposed of on their merits. *See Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975) (fact that state courts found it necessary to attempt to distinguish a decision of this Court enunciating federal constitutional principles reveals federal basis of state courts' decisions).

Judge Taylor's closure order.[18] All three judgments are final and reviewable in this Court on appeal or on certiorari.[19]

II.

The United States Constitution Guarantees the Right to Attend and Observe Criminal Trials.

Introduction.

With the sole exception of those who rule unabashedly by brute force, no government has ever claimed legitimacy while embracing a power to conduct criminal trials in secret. Indeed, the principle of public criminal trials has received wide adherence as much because open trials best

[18] The Virginia Supreme Court has original jurisdiction in cases of mandamus and prohibition. Va. Const. Art. VI, § 1; Va. Code § 17-96; Va. S. Ct. Rule 5:5. *Cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175-176 (1803).

[19] As to the judgments of the court below dismissing appellants' petitions for writs of mandamus and prohibition, the Virginia Supreme Court was not only the "highest court . . . in which a decision could be had," 28 U.S.C. § 1257; it was the *only* court. *See, e.g., Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) (reviewing denial of writ of prohibition); *Michigan Central Railroad Co.* v. *Mix*, 278 U.S. 492, 494 (1929) (same); *Hartman* v. *Greenhow*, 102 U.S. 672, 676 (1881) (reviewing Virginia Supreme Court's denial of writ of mandamus).

The government has not suggested in this Court or in opposing the appeal below any nonfederal ground on which any of the three judgments of the Virginia Supreme Court could be upheld without reaching the federal questions presented here. Indeed, no such ground could be suggested, for none was relied upon by the Virginia Supreme Court, and it is settled that the theoretical possibility that some independent and adequate nonfederal ground might have been available, *see* Motion at 7, cannot relieve "this Court of the necessity of considering the federal question[s]" decided below. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-631 (1973); *see California* v. *Byers*, 402 U.S. 424 (1971); *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967) (per curiam); *Evans* v. *Newton*, 382 U.S. 296, 302 (1966). *Cf. Gannett*, 99 S.Ct. at 2903-2904.

evince a government's democratic character, as because secret trials inevitably evoke public terror.

Powerfully indicative of the central place of open trials in Anglo-American history is the fact that "[t]he practice of conducting . . . trial[s] in public was established as a feature of English justice long before the defendant was afforded even the most rudimentary rights." *Gannett,* 99 S.Ct. at 2927 (Blackmun, J., concurring in part and dissenting in part). The centuries-old tradition of open criminal trials in England and the United States bespeaks the realization that a legal system's very legitimacy requires openness regardless of what a criminal trial's participants may wish. It is for this reason that public criminal trials were initially viewed as "a characteristic of the system of justice, rather than . . . a right of the accused." *Id.* at 2928.

In canvassing state laws on this subject some three decades ago, this Court noted that, "almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public." *In re Oliver,* 333 U.S. 257, 267-68 (1948) (footnotes omitted). Most prophetically, the very statute involved in this appeal was singled out for quotation as the exceptional case. *Id.* at 267 n.17. Similar provisions exist elsewhere,[20] but only recently have any courts thought to exercise such grants of latent authority to cordon off entire criminal trials.[21] In fairness, these departures from the prescribed

[20] *E.g.,* Iowa Code Ann. § 605.16 (West 1975 & Supp. 1979-1980) ("All judicial proceedings must be public, unless otherwise specially provided by statute *or* agreed upon by the parties.") (emphasis added); Ariz. Rev. Stat. Ann., R. Crim. P. 9.3(b) (closure on application of defendant authorized in all proceedings if court finds "clear and present danger" to fair trial).

[21] Before one month had passed from the date of the Court's decision in *Gannett,* serious breaches in the public's right of access to criminal trials had begun to appear. Research by a number of interested groups indicated that, as of the time this appeal was docketed, at least the following had occurred. One rape trial was entirely closed. *State* v. *Hicks,* No. 5003 (Md. Cir. Ct.). A murder trial was closed to the press—although not to the public. *State* v. *Woomer,* No. 79-GS-26-203 (S.C. Cir. Ct.) (jury selection proceeding) (pretrial suppression hearing). Another rape trial proceeded behind the screen of a gag order. *State* v. *Giles,* No. CC79-090-091 (Ala. Cir. Ct.) (on motion of judge) (alleged possible prejudice to co-conspirator in separate trial). Closure motions were pending in two federal district courts, *United States* v. *Powers,* No. 79-26 (S.D. Iowa) (opposed by prosecution); *United States* v. *Benson,* 79-30054 (M.D. Tex.) (bribery trial of former public official), and in two cases trial closure motions had been refused. *People* v. *Bartowsheski,* No. 79CR-516 (Colo. Dist. Ct.) (opposed by prosecution) (jury instructed not to read or listen to news accounts of trial); *People* v. *Angus,* No. 104-69-78 (N.Y., Albany County Ct.) (alleged possible prejudice to witness in future trial). This burgeoning series of cases strongly suggests that the unbounded authority conferred by Va. Code § 19.2-266 is by no means unique. As the *Gannett* Court itself noted, at least some other states have statutes that could be similarly construed. 99 S. Ct. at 2910 n.19. *See* n.20 *supra.* And the questions posed would not be materially different were closure ordered pursuant to purely judge-made rules.

historical and constitutional route appear to represent neither caprice nor calculation, but simply a mistaken reading of this Court's decision in *Gannett.* For that case decided only "[t]he question . . . whether members of the public have an independent constitutional right [under the Sixth and Fourteenth Amendments] to insist upon access to a *pre*trial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial." 99 S.Ct. at 2901 (emphasis added). The Court's negative answer to that question was premised upon the "special risks of unfairness" if "potential jurors [learned] of inculpatory information wholly inadmissible at the actual trial." *Id.* at 2905.

But no such "special risks" are involved in the criminal trial proper, since "inadmissible prejudicial information about a defendant can [then] be kept from a jury by a variety of means." *Id.* (footnote omitted). And while the public interest in a *pre*trial proceeding may be partly served by subsequent release of the transcript if one is made and typed, and by the rehearing that may be triggered if corruption is revealed, these potential palliatives are ineffective at the trial stage, since the double jeopardy rule bars retrial and since the credibility of testimony, on which the question of guilt or innocence routinely turns, can never be adequately assessed from a cold transcript.

Thus, unlike pretrial suppression hearings—which pose difficult problems of accommodating the public's historically unquestioned right of access with the accused's right to prevent jurors from becoming aware of inadmissible evidence—criminal trials themselves involve no need, and present no occasion, for any broad inroad upon the rights of orderly observers to take their seats in the courtroom for the purpose of seeing justice done. Given the total absence of any legitimate (let alone compelling) interest in excluding all members of the public from an entire criminal trial, the claim of statutory or judge-made authority to exercise such extraordinary power cannot be countenanced by this Court.

Thus, whether invoked pursuant to a statutory provision like Virginia's or otherwise, the power—or simply the imagined duty—to conduct entire criminal trials in secret plainly does not follow from *Gannett* and should be repudiated by this Court as a singularly unwarranted "menace to liberty," *In re Oliver, supra,* 333 U.S. at 269, and to fair process. Only in this way can the deep-rooted and hallowed tradition of open trials be promptly restored. Nor should it prove difficult to identify a constitutional basis for what

has so long been taken for granted. For so fundamental is the open trial principle that its expression in and enforcement under the Constitution is not limited to a single provision, but rather is implicit in several separate provisions, and in their interrelated meaning and structure.

A. The First Amendment Secures Such a Right.

In *Gannett* this Court was willing to assume, but did not decide, that the First Amendment "may guarantee" public access to criminal trials. 99 S.Ct. at 2912 (majority opinion).[22] Appellants now urge this Court to recognize a First Amendment right of members of the public to attend criminal trials—a right essential to intelligent self-government, a right reflecting the public character of criminal trials, a right indispensable to public participation in a vital social drama—a right government may not limit without compelling justification, and never by closing an entire criminal trial.[23]

1. *Conducting criminal trials in secret deprives citizens of information singularly vital to self-government.*

In affirming the Hanover County Circuit Court's closure of an entire criminal trial, the Virginia Supreme Court

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[22] Of the four Justices who joined in Justice Stewart's majority opinion, Justice Powell was prepared to recognize "[a] right of access to judicial proceedings" under the First Amendment, 99 S.Ct. at 2915 (concurring opinion), while Justice Rehnquist recognized no such right. *Id.* at 2918-19 (concurring opinion). Justice Blackmun and the three others who joined him declined to reach "the issue of First Amendment access," *id.* at 2940 (Blackmun, J., joined by Brennan, White, and Marshall, JJ., concurring in part and dissenting in part), but pointedly observed that "this Court's prior decisions emphasizing the protection afforded reporting of judicial proceedings under the First Amendment . . . point up the grave concern that information relating to the administration of criminal justice be widely available." *Id.* at 2922 n.2.

[23] *See* Parts III and IV *infra.*

sanctioned the suppression of information vital to self-government. Such information has always received this Court's most zealous protection, for it "lies near the core of the First Amendment." *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 838 (1978). *See First National Bank* v. *Bellotti,* 435 U.S. 765, 776-78 (1978); *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269-70 (1964); *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 247, 250 (1936); *Whitney* v. *California,* 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring); A. Meiklejohn, *Free Speech And Its Relation To Self-Government* (1948).

No realm of knowledge is more crucial to intelligent self-government than knowledge about how government power is being exercised—particularly in courts of justice. *See Landmark Communications, Inc.* v. *Virginia, supra,* 435 U.S. at 838-39; *Wood* v. *Georgia,* 370 U.S. 375, 391 (1962). The people and their legislators cannot possibly "vote intelligently," *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975), for prosecutors and elected judges,[24] or "register opinions," *id.,* on issues of judicial administration and court reform—or on the very substance of the criminal law—if trials may be held behind closed doors. Thus, "[o]ne of the demands of a democratic society is that the public should know what goes on in courts . . . to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland* v. *Baltimore Radio Show, Inc.,* 338 U.S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of certiorari to 193 Md. 300, 67 A.2d 497 (1949)). As long as we prize "'the intelligent discharge of . . . political responsibilities,'" *Gannett,* 99 S.Ct. at 2914-15 (Powell, J., concurring), quoting *Saxbe* v. *Washington Post Co.,* 417 U.S. 843, 863 (1974) (Powell, J., dissenting), it can never be claimed in a democratic society that the public may be denied "the right to know what is being done in their courts." *State* v. *Hensley,* 75 Ohio St. 255, 257, 79 N.E. 462, 463-64 (1906). *See Gannett,* 99 S.Ct. at 2922-23 & n.2, 2930-31 (Blackmun, J., concurring in part and dissenting in part). Accordingly, "[t]he suggestion that there are limits upon the public's right to know what goes on in the courts causes . . . deep concern." *Estes* v. *Texas,* 381 U.S. 532, 614-15 (1965) (Stewart, J., joined by Black, Brennan, and White, JJ., dissenting).[25]

Such concern is all too well founded. For, as James Madison wrote nearly two centuries ago:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 *Writings of James Madison* 103 (G. Hunt ed. 1910).

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[24] Virginia's Attorney General is elected by state-wide popular ballot, Va. Const. Art. VI, § 15; Va. Code Ann. § 24.1-80 (1973), and each county's voters elect a Commonwealth's Attorney. Va. Const. Art. VII, § 4; Va. Code Ann. § 24.1-86 (1973 & Supp. 1979). The judges of the state's circuit courts are elected by a majority of the elected members of the Virginia General Assembly. Va. Const. Art. VI, § 7; Va. Code Ann. §§ 17-120 to 17-122.1 (1975 & Supp. 1979).

[25] In *Estes,* this Court found that the accused had been denied due process by the electronic media's broadcasts of his trial, but emphasized that "the public has the right to be informed as to what goes on in its courts," 381 U.S. at 541, that the various news media "are entitled to the same rights [of access] as the general public," *id.* at 540, and that the press may thus attend criminal trials "if they wish to be" present, *id.* at 541—whether or not at the pleasure of the participants in the litigation. *See also id.* at 584-85 (Warren, C.J., joined by Douglas and Goldberg, JJ., concurring).

2. *Denying access to the unique source of this vital information constitutes forbidden censorship.*

Whatever the limits on the public's right to *demand* knowledge, *see, e.g., Zemel* v. *Rusk,* 381 U.S. 1, 17 (1965) (there is no "unrestrained right to gather information" that entitles one to insist on a passport to Cuba or, *e.g.*, to demand entry to the White House), this Court has unanimously affirmed that the First Amendment confers at least *"some* protection for seeking out the news," *Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972) (emphasis added), protection without which "freedom of the press could be eviscerated." *Id.* Thus the Court has stressed that "reporters remain free," although they have no special privilege, "to seek news from any source by means within the law." *Id.* at 681-82. For "imposing upon [the public and press] the burden of justifying [their] presence is contrary to where . . . the presumption must lie in the area of First Amendment freedoms . . . and . . . contains an invitation to censorship which [this Court should not] accept." *Estes* v. *Texas, supra,* 381 U.S. at 615 (Stewart, J., joined by Black, Brennan, and White, JJ., dissenting).

Censorship of news commonly brings to mind an image of public officials tearing stories out of newspaper galleys —"tell[ing] the press what it may and may not publish." *Gannett,* 99 S.Ct. at 2915 (Powell, J., concurring). But, as Justice Rehnquist has observed, "censorship . . . as often as not is exercised not merely by forbidding the printing of information in the possession of a correspondent, but in *depriving him of access to places where he might obtain such information.*" Rehnquist, "The First Amendment: Freedom, Philosophy, And The Law," 12 Gonz. L. Rev. 1, 17 (1976) (emphasis added). Whether a particular deprivation of access is constitutionally permissible obviously depends on the character of the place or source

from which the information is sought. That observers may be excluded from "grand jury proceedings, [this Court's] conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations," *Branzburg* v. *Hayes, supra,* 408 U.S. at 684, plainly does not imply that observers may similarly be excluded from traditionally and distinctively *public* places or proceedings.

This Court has never hesitated to examine the history and function of settings and institutions in order to identify certain forums[26] and certain functions[27] as inherently "public" for various purposes as a matter of constitutional law—regardless of the government's attempt to treat them as something else. By the criteria this Court has employed in the course of such examination, courtrooms are undeniably public forums and criminal trials undeniably public events for purposes of orderly attendance and observation.

a. Criminal Trials Are Public By Tradition.

That government maintains physical control over courtrooms—as over city streets, public parks, capitol grounds, and public libraries—does not deprive them of their public character. For "[i]t is the practice of Western societies, and has been part of the common-law tradition for centu-

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[26] *E.g., Evans* v. *Newton,* 382 U.S. 296 (1966) (municipal park); *Marsh* v. *Alabama,* 326 U.S. 501 (1946) (streets of a town). Contrast, *e.g., Greer* v. *Spock,* 424 U.S. 828 (1976) (military base); *Pell* v. *Procunier,* 417 U.S. 817 (1974) (jail cells); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974) (same); *Adderley* v. *Florida,* 385 U.S. 39 (1966) (jailhouse grounds).

[27] *E.g., Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 353 (1974) (eminent domain) (dictum); *Marsh* v. *Alabama,* 326 U.S. 501 (1946) (running a town); *Terry* v. *Adams,* 345 U.S. 461 (1953) (election). Contrast, *e.g., Jackson, supra* (providing electrical service).

ries, that trials generally be public." *Gannett,* 99 S.Ct. at 2913 (Burger, C.J., concurring). In such a setting, "First Amendment values [must] inalterably prevail," *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302 (1974), in view of the undeniable " 'history of the place.' " *Id.,* quoting *M'Ara* v. *Magistrates of Edinburgh,* [1913] Sess. Cas. 1059, 1073-74 (per Lord Dunedin, J.). And the precise sense in which criminal trials have always been "public" fits perfectly the right that appellants claim: Appellants seek First Amendment protection not for "demonstrations in or near . . . courtrooms . . . at the time of trial," *Cox* v. *Louisiana,* 379 U.S. 559, 565 (1965), but for quiet and peaceful observation of criminal trials—" 'that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.' " *Gannett,* 99 S.Ct. at 2931 n.10 (Blackmun, J., concurring in part and dissenting in part), quoting *Cowley* v. *Pulsifer,* 137 Mass. 392, 394 (1884) (per Holmes, J.). *Cf. Marsh* v. *Alabama,* 326 U.S. 501, 505, 508 (1946) (right to receive leaflets in company-owned town). *See generally Grayned* v. *City of Rockford,* 408 U.S. 104, 116 (1972); Kalven, "The Concept Of The Public Forum: Cox v. Louisiana," 1965 Sup. Ct. Rev. 1.

b. Criminal Trials Are Public By Function.

That criminal trials *must* be open to public observation if they are to fulfill their historic mission follows not only from their irreplaceable role as sources of information about how the entire system of criminal justice is functioning, but also from the special character of criminal trials as unique communicative events, enabling "[t]he victim of the crime, the family of the victim, others who have suffered similarly, or others accused of like crimes, [to] . . . observ[e] the course of a prosecution." *Gannett,* 99 S.Ct.

at 2930 (Blackmun, J., concurring in part and dissenting in part). *Cf.* F. Kafka, *The Trial* 49-55 (W.&E. Muir trans. 1968) ("In The Empty Courtroom").

More fundamentally, every criminal trial is a vital social drama—a grave occasion on which the entire community, acting through carefully-chosen representatives, determines the fate of those accused of breaking its laws. So long as it is open, the proceeding has about it a quality of solemn ritual, which serves not only to impress upon the jury the seriousness of its mission, but also to assure the larger community that the criminal sanction is justly imposed. But when a criminal trial is conducted in secrecy, the public cannot feel assured that justice has been done in any particular case, for the public has not been allowed to satisfy itself that each actor has properly discharged his role in the "theatre of justice." 1 J. Bentham, *The Rationale Of Judicial Evidence* 597 *et passim* (J. Mill ed. 1827).[28]

No sense of catharsis is possible " 'where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's conclusion sealed from view.' "

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[28] As Bentham wrote in his treatise:

> [B]y publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means: a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice. Without effort on their own parts, without effort and without merit on the part of their respective governments, they learn the chief part of what little they are permitted to learn (for the obligation of physical impossibility is still more irresistible than that of legal prohibition), of the state of the laws on which their fate depends.

Id. at 525.

Gannett, 99 S.Ct. at 2931 (Blackmun, J., concurring in part and dissenting in part), quoting *United States* v. *Cianfrani,* 573 F.2d 835, 851 (8th Cir. 1978). Secret trials can be neither an experience in justice for the community nor a symbol of public morality. *See* T. Arnold, "The Criminal Trial As A Symbol Of Public Morality," in *Criminal Justice In Our Time* 141-43 (A. Howard ed. 1965); C. Fried, *An Anatomy Of Values* 125-32 (1970); H. Hart, "The Aims Of The Criminal Law," 23 Law & Contemp. Prob. 401 (1958); Note, "Trial Secrecy And The First Amendment Right Of Public Access To Judicial Proceedings," 91 Harv. L. Rev. 1899, 1906-09 (1978). Secret criminal trials instead portend a regime of "mystery, miracle, and authority," F. Dostoevsky, *The Brothers Karamazov* 301 (D. Magarshack trans. 1958)—a regime wholly inhospitable to First Amendment values and traditions.[29]

Given the unbroken public tradition and unmistakably open character of criminal trials, it is entirely unsurprising that this Court so confidently proclaimed in *Craig* v. *Harney,* 311 U.S. 367, 374 (1947), that "[a] trial is a public event. What transpires in the court room is public property. . . ." [30]

[29] Viewed in this light, the functions of the pretrial suppression hearing and those of the trial-in-chief stand at opposite poles. The suppression hearing is an internal judicial mechanism for screening out those evidentiary items that should never be shared with the community or with the jury as its formal representatives. *Gannett,* 99 S.Ct. at 2905. The trial, by contrast, is an external drama whose first task is "the determination of truth," *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406, 416 (1966)—not as the historian or the clinician might determine that truth, but through the public forms of justice. *See generally* D. Lerner, *Evidence and Inference* (1959).

[30] *See also Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 609 (1978); *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 840 (1978); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492-95 (1975).

c. Criminal Trials Are Public As A Matter of Constitutional Text And Structure.

That the Constitution provides no warrant for treating criminal trials as purely personal affairs is plain enough: Nothing in the Constitution entitles the accused to compel a *private* trial. *Gannett,* 99 S.Ct. at 2907 n.11. Indeed, "[b]y express command of the Sixth Amendment the proceeding *must* be a 'public trial.' " *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 36 (1978) (Stevens, J., joined by Brennan and Powell, JJ., dissenting) (emphasis added). This command at least implies that government cannot claim unfettered discretion to treat criminal trials as wholly internal and confidential, or to view the information such trials yield as "information generated and controlled by government." *Houchins* v. *KQED, Inc., supra,* at 16 (Stewart, J., concurring in judgment). *See id.* at 36-37 (Stevens, J., joined by Brennan and Powell, JJ., dissenting).

For even if the Sixth Amendment were deemed to confer rights only on the accused,[31] that fact would alone suffice to remove criminal trials from the realm of official proceedings within government's unilateral control. *Cf. Branzburg* v. *Hayes,* 408 U.S. 665, 684 (1972); *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974); *United States* v. *Nixon,* 418 U.S. 683, 705 (1974); *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 834-37, 841 (1978). "[T]he Sixth Amendment presumes . . . open trials as a norm." *Gannett,* 99 S.Ct. at 2908.

Unlike the "unshared power" over foreign policy data conferred by the Constitution on the Executive, *New York Times Co.* v. *United States,* 403 U.S. 713, 729 (1971) (Stewart, J., joined by White, J., concurring), the power over access to a criminal trial *is* shared—at least with the ac-

[31] *But see* Part II-B *infra.*

cused—simply by virtue of the Sixth Amendment. It follows that, unlike the "unshared duty [of the Executive] to determine . . . the degree of internal security necessary to exercise that [unshared] power successfully," *id.*, the duty to determine the degree of confidentiality due in a criminal trial does not belong, unshared, to those who prosecute and judge the accused. Even without the First Amendment, therefore, unilateral government control over access to criminal trials remains constitutionally unavailable: The accused may always insist on a public trial under the Sixth Amendment.

The First Amendment thus operates in this case not as "some sort of constitutional 'sunshine law,'" *Gannett,* 99 S.Ct. at 2918 (Rehnquist, J., concurring); it does not open to public gaze information and proceedings otherwise securely within the Government's unilateral control. The First Amendment instead opens a constitutional window into a proceeding *already identified by the Sixth Amendment as beyond such control*—assuring that, even with the connivance of the accused,[32] the state may not bar members of the public and press from a criminal trial without compelling justification. Even if the Sixth Amendment's public trial guarantee runs only to the accused, therefore, the First Amendment provides a "way to ensure that the public interest is protected." 99 S.Ct. at 2935 (Blackmun, J., concurring in part and dissenting in part).

The proceedings of criminal trials are the quintessential subjects of First Amendment protection against governmental interference with public access: public by tradition, public by function, and public as a matter of constitutional text and structure. It is difficult to imagine many settings

[32] *See* n.34 *infra.*

in which so powerful a confluence of proofs may be adduced to support a protected right of access.

d. The Possible Absence Of A "Willing Speaker" Cannot Justify Denying Access.

Members of the public have a First Amendment right to attend criminal trials even though the accused—and, indeed, *all* of the trial's participants—might wish to prevent the public from seeing and hearing the proceedings. It is, of course, settled that the First Amendment protects not only the right to *communicate* information, but also the right to *receive* it. *See, e.g., First National Bank* v. *Bellotti,* 435 U.S. 765, 781-83, 791-92 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756-57 (1976); *Kleindienst* v. *Mandel,* 408 U.S. 753, 762 (1972); *Red Lion Broadcasting Co.* v. *FCC,* 385 U.S. 367, 390 (1969); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Marsh* v. *Alabama,* 326 U.S. 501, 505, 508 (1946); *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943). This right to receive information is protected even when the speaker is not entitled to the Constitution's protection at all, *see Lamont* v. *Postmaster General, supra,* and even when the speaker's right to invoke the First Amendment is at best unsettled. *See First National Bank* v. *Bellotti, supra; Procunier* v. *Martinez,* 416 U.S. 396, 408-09 (1974); *Stanley* v. *Georgia,* 394 U.S. 557, 563-64 (1969). So, too, the fact that the original source of information now in the hands of another might have been unwilling to communicate it is constitutionally irrelevant, *see, e.g., Smith* v. *Daily Mail Publishing Co.,* 99 S.Ct. 2667 (1979); *Oklahoma Publishing Co.* v. *District Court,* 430 U.S. 308 (1976); *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976); *New York Times Co.* v. *United States,* 403 U.S.

713 (1971), just as it is constitutionally irrelevant that the original source might be entirely willing. *See, e.g., Houchins* v. *KQED, Inc.*, 428 U.S. 1 (1978); *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974). Indeed, when the "source" of information is not a person or organization at all, but in fact a *place* or a *proceeding*, the dichotomy between "willing" and "unwilling sources or speakers itself becomes an irrelevant talisman.[33]

Consider, for example, a state policy of purchasing books for a public library and then rigidly controlling access to the library's reading rooms, delegating to a public official unbridled discretion to decide which members of the public and press might use such library facilities to read which government-purchased books. It seems plain that excluded persons would have a powerful First Amendment claim—a claim obviously independent of the rights of the authors of

[33] To illustrate the arbitrary character of any such dichotomy in the instant setting, one need only recall that John Paul Stevenson's 1976 murder conviction was reversed because his wife's out-of-court identification of a bloodstained shirt as belonging to Stevenson was held to be inadmissible hearsay. *Stevenson* v. *Commonwealth*, 218 Va. 462, 465-66, 237 S.E.2d 779, 781-82 (1977). *See* n.1 *supra*. If the prosecution had introduced *admissible* evidence of the shirt's ownership at Stevenson's most recent retrial, and if Stevenson's wife had been willing to testify on his behalf that the shirt belonged to someone else, *see* Va. Code § 19.2-271.2, then the closure order upheld by the court below would quite literally have prevented the public, including the victim's surviving relatives, from seeing this very "willing speaker" and hearing what she had to say. Stevenson's initial conviction was reversed precisely because a mere report of what his wife had previously said *out of court* was an insufficient substitute for *his* seeing and hearing her say it *in court*, face-to-face, under oath, and subject to cross-examination. *See* n. 37 (2d ¶) *infra*. Surely rights of access for interested members of the public and the press cannot be made to turn on such adventitious circumstances. The conclusion must be that the search for willing and unwilling speakers is, in this context, a largely useless diversion.

the books in question,[34] and a claim in no sense defeated by the unwillingness of the state, as the intermediate "speaker," to provide full public access. *See Minarcini* v. *Strongville City School District*, 541 F.2d 577, 584 (6th Cir. 1976) (ordering district court to direct replacement by school board of banned library books); *Cary* v. *Board of Education*, 427 F.Supp. 945, 953 (D.Colo. 1977) ("school board may not impose its value judgments on literature [teachers and students choose] to consider"); *Right to Read Defense Committee* v. *School Committee*, 454 F.Supp. 703 (D.Mass. 1978) (enjoining school board's ban of controversial anthology).

e. The State's Conduct In Trying The Accused Is Itself Inconsistent With A "No Willing Speaker" Theory.

By choosing to bring a public indictment against the accused, to subject him to trial before a cross-section of the community, and to seek a public condemnation of him by that body—in these ways and in others[35] the state waives any possible claim to treat the contents of the trial as "information generated or controlled by government," *Houchins* v. *KQED, Inc., supra*, 438 U.S. at 16 (Stewart, J., concurring in judgment)—information still held entirely secret within the bosom of the state.

[34] One might imagine certain authors acquiescing in, or even requesting, such censorial power, without in the least altering this conclusion.

[35] Needless to say, the state's own representation in this case that "the tape recording of Stevenson's trial has been available and remains available at the Circuit Court of Hanover County," Motion to Dismiss at 12 n.*, only further belies any attempt to characterize as internal to government the events that transpired at John Paul Stevenson's murder trial on September 11 and 12, 1978. Indeed, that very representation itself demonstrates the state's willingness to reveal—if in its own good time, to the extent it finds suitable, and with a texture it finds convenient—what went on in defendant Stevenson's trial.

It follows that, in sharp contrast to the submission of evidence to a judge for preliminary screening as to admissibility, the presentation to a jury of the evidence in this trial can only be considered a public airing of the state's case against the accused. For this reason, and for all of the reasons set forth above, the state's exclusion of the public and press from that proceeding can only be interpreted as an official decision to censor public consciousness of an undeniably public event, in unjustifiable derogation of "the public's right to know what goes on when men's lives and liberty are at stake. . . ." *Houchins* v. *KQED, Inc., supra,* 438 U.S. at 37 n.32 (Stevens, J., joined by Brennan and Powell, JJ., dissenting), quoting *Lewis* v. *Peyton,* 352 F.2d 791, 792 (4th Cir. 1975).

Because the state has no legitimate claim of control in the first instance over the information yielded by its trial of an accused, a trial court cannot be allowed to censor an entire criminal trial at the joint request of the accused and the prosecution. Denying access in this special context amounts to an abridgment of First Amendment freedoms, establishing a regime under which "freedom may rest upon the precarious base of judicial sensitiveness and caprice. And a chain reaction may be set up, resulting in countless restrictions and limitations on liberty." *Pennekamp* v. *Florida,* 328 U.S. 331, 370 (1946) (Murphy, J., concurring).

3. *Only a right to attend and observe criminal trials can assure the access which the First Amendment protects.*

Whether or not some of the functions served by the First Amendment right of access, *see* Part II-A(1), (2) *supra,* can be replaced by supplying a recording or transcript of pretrial suppression hearings to interested parties as soon as the risks that were deemed to justify closure have dissipated, *see Gannett,* 99 S.Ct. at 2912 (majority opinion) (suggesting affirmative answer); *id.* at 2917 & n.4 (Powell, J., concurring); *cf. id.* at 2937 n.17 (Blackmun, J., concurring in part and dissenting in part) (suggesting negative answer), it seems clear that few if any of those functions can be discharged by such a device in a setting where an entire criminal trial has been closed to the public and the press.

Insofar as the First Amendment right of access to the trial itself embodies a right of the community to share in the "theatre of justice," there can be no doubt that a mere technological substitute cannot suffice.[36] Moreover, a recording or a transcript can scarcely serve the function of informing the public at a time when the news is still fresh. *See Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 561; *id.* at 609 (Brennan, J., joined by Stewart and Marshall, JJ., concurring); *Bridges* v. *California,* 314 U.S. 252, 268 (1941). This is especially true when the rationale of a closure order is not the maintenance of secrecy simply until a jury can be impanelled, *cf. Gannett,* 99 S.Ct. at 2905, but the prevention of any possible prejudice in a potential retrial (A. 14a-15a); Motion to Dismiss at 13 n.9. For following such a rationale would require the unthinkable policy of closing *all* criminal proceedings, and impounding *all* tape recordings and transcripts—until *every* direct and collateral route of review and retrial had been thoroughly and finally exhausted.

Even if the First Amendment proscription of delay could be altogether ignored, we dare not depend upon the

[36] *See* W. Benjamin, *Illuminations* 243 n.3 (H. Arendt ed. 1969) ("The poorest provincial staging of *Faust* is superior to a *Faust* film in that, ideally, it competes with the first performance at Weimar"); S. Sontag, *On Photography* 153-80 (1977) (discussing refractive effect of technological representation).

preparation of post-trial transcripts to bring the full truth to light. Not many people can afford the expense, especially after a long trial. In addition, the only available recording of what transpired at trial might prove to be garbled or inaudible.[37] And, even if the recording were both complete and unflawed, such matters as demeanor and credibility—plainly critical at the trial-in-chief—would be forever lost if only a cold transcript were available.[38]

[37] The existence and availability of "the tape recording of the Stevenson's trial," or part of it, was revealed for the first time in respondents' Motion to Dismiss before this Court. Motion at 12 n.8. Appellants' efforts to obtain access to or transcripts of the "tape recording" met substantial obstacles both in time and in cost. A special schedule had to be arranged weeks in advance with the court reporter, who, apparently by court order, had to be present to operate the dictabelt machine and who charged for these services twice her *per diem* rate of $60.00. According to the reporter, a complete trial transcript would cost $2,162, and it is not clear how long it would take to prepare—or when preparation would even begin. The recordings themselves contain many substantial segments that are inaudible, garbled by overlapping conversation, or incomprehensible because a speaker cannot be identified or because an exhibit (of which there were many), is unexplained, and segments otherwise casualties of technical distortion and mechanical breakdown. Lost completely, of course, is the crucial demeanor evidence and, for the most part, voice inflections and other telltale signs of untruthfulness. *See* n.38 *infra*.

In answer to the concern of the victim's family and of the public over why a murder case—where the defendant has been convicted once, and there is apparently enough evidence to fuel three more prosecutions—should suddenly be taken from the jury to be ended abruptly with a judicial acquittal, the tapes disclose only a barely audible statement by the trial judge, who appears to have said something like this: "The prosecution's case is filled with holes."

[38] *See, e.g., NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (per curiam); *Mincey* v. *Arizona*, 437 U.S. 385, 410 (1978) (Rehnquist, J., concurring in part and dissenting in part); *Davis* v. *Alaska*, 415 U.S. 308, 321 (1974) (White, J., joined by Rehnquist, J., dissenting). Not only would a recording or transcript be unable to disclose various forms of nonverbal evidence, *see* 3 *Wigmore on Evidence* §§ 789-798a (J. Chadbourn, ed. 1970); neither instrument could convey witness demeanor of the very sort that has made trial courts reluctant to award summary judgment on the basis of affidavits when credibility is at stake, *see* 6 Moore's *Federal Practice* ¶ 56.11 at 56-200 (2d ed. 1976), and made appellate courts reluctant to review a fact-finder's assessments of credibility. *See, e.g., United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949); *Orvis* v. *Higgins*, 180 F.2d 537 (2d Cir. 1950).

For similar reasons, this Court has refused to treat the fact of a would-be listener's access to a lecturer's writings, or even access to electronic recordings of the lecturer's voice, as an answer to the would-be listener's First Amendment objections to government interference with his access to the lecturer's "physical presence." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972). And, again stressing the inherent inadequacy of paper or mechanical substitutes for directly-observed live testimony, this Court has treated the jury's opportunity to view a witness "face to face," *Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895), as central to the Sixth Amendment right of confrontation—holding, for example, that a conviction based partly upon a transcript of an accuser's prior testimony violates the confrontation clause even if the accused had a chance to cross-examine the accuser at the time the transcribed testimony was given. *Barber* v. *Page*, 390 U.S. 719, 725-26 (1968) (confrontation clause requires at least a good faith attempt by state to assure accuser's presence at trial).

Thus critical information about the administration of criminal justice—information originating uniquely in criminal trials—will reach the public only if this Court recognizes not the compromised right to learn *someday*, through an indirect technological source, what went on at trial, but *a right to be there:* "the right to observe the administration of justice," *E.W. Scripps Co.* v. *Fulton*, 100 Ohio App. 157, 162, 125 N.E. 896, 906 (1955)—or, for those persons who do not attend, the right to learn promptly from those members of "the press [who are present] what happens there." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of certiorari to 193 Md. 300, 67 A.2d 497 (1949)). *See Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 850 (1974) (Powell, J., dissenting); *Gannett*, 99 S.Ct. at 2914-15 (Powell, J., concurring).

B. The Sixth Amendment Secures Such a Right.

Every Member of this Court agreed in *Gannett* that, apart from the defendant's right to demand the safeguard of publicity, there is "an *independent* public interest in the enforcement of [the] Sixth Amendment" guarantee of a public trial. 99 S.Ct. at 2907 (emphasis added). *See id.* at 2913 (Burger, C.J., concurring); *id.* at 2914 (Powell, J., concurring); *id.* at 2930-33 (Blackmun, J., concurring in part and dissenting in part). In addition to the defendant's right to a public trial, therefore, the Sixth Amendment "presumes open trials as a *norm*," *id.* at 2908 (majority opinion) (emphasis added), a norm serving not only vital educative and participatory functions, *see* Part II-A *supra*, but also the distinctive functions of deterring perjury, inducing unknown witnesses to come forward, and guarding against prosecutorial and judicial ineptitude or misconduct.

The protections which publicity thus provides, as this Court recognized when it referred to the "independent" public interest in enforcing the public trial clause, do not always serve the interests of the defendant, the prosecutor, or the trial judge—each of whom might stand to gain far more from concealment than he would lose. *See* 99 S.Ct. at 2930 (Blackmun, J., concurring in part and dissenting in part). To rely *exclusively* upon the trial's self-interested participants to vindicate the Sixth Amendment's manifold aims ignores teachings about human nature far older than the Sixth Amendment. *Cf. Dr. Bonham's Case*, 8 Co. 114a, 118a (1610) (a "person cannot be judge in his own cause"). *See* J. Bentham, *The Rationale of Judicial Evidence* 576-77 (J. Mill ed. 1827).[39]

[39] There is nothing in the cursory exchanges among defense counsel, the prosecutor, and the trial judge on the subject of closure in this case, *see, e.g.* (A. 19a), to make one doubt this ancient learning. Given the clear absence of any need to close the trial to assure fairness to the defendant, *see* Parts III & IV *infra*, one is led to wonder who in this case was trying to hide what. Nor does the alternative supposition—essentially motiveless closure, representing perhaps the path of least resistance and the course least likely to trigger appellate review—augur well for the survival of Sixth Amendment values.

1. Excluded Members of the Public Have Standing to Invoke the Public Trial Guarantee.

Even assuming that a particular case might give rise to some conceivable constitutional justification for closing an entire trial, it is clear that any *unwarranted* instance of closure would violate the "independent public interest" protected by the Sixth Amendment's open trial norm. As such, the question of whether an ousted member of the public should be entitled to invoke the Sixth Amendment as a basis for reviewing the closure order's validity is essentially one of standing. And, tested under both constitutional and prudential criteria, those expelled from the courtroom plainly do have standing to seek judicial protection of their independent Sixth Amendment interests. Unquestionably, the "case or controversy" requirement is met, since those ousted from a criminal trial plainly have the requisite "personal stake in the outcome," *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), having suffered a "distinct and palpable" injury traceable directly to the constitutionally challenged closure order. *See Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977).[40]

Beyond that, the standing of persons expelled from court would more than satisfy "prudential concerns." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978). Indeed, to *reject* the standing of ousted in-

[40] *See* nn. 41, 43 *infra*.

dividuals to invoke the Sixth Amendment would imprudently limit this Court's ability to oversee state and federal judicial adherence to the Constitution's norm of open trials. *Cf. Baker* v. *Carr,* 369 U.S. 186 (1962); *Flast* v. *Cohen,* 392 U.S. 83 (1968). Appellants, like any other members of the public who have been personally ousted from a trial, are not asserting some "generalized grievance shared by a large number of citizens in a substantially equal measure," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra* at 80; instead, they have suffered a direct, individual, and particularly focused harm. For newspapers, which have a civic obligation to report trial proceedings; for the victims or their families and friends; and for other members of the public with a specialized interest in the case, the injury of forced exclusion is especially poignant.[41] Moreover, there can be no question that when those ousted are granted standing, "the most effective advocate[s] of the [Sixth Amendment] rights at issue [are] present to champion them." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra* at 80. *See Central South Carolina Chapter* v. *Martin,* 556 F.2d 706, 708 (4th Cir. 1977).[42]

[41] This seems particularly clear once it is recognized that violation of the Sixth Amendment's open trial "norm," *Gannett,* 99 S.Ct. at 2908, in a case where closure has been granted at the accused's request for impermissible or insufficient reasons, would violate a governmental duty running directly to those who are improperly ousted. Cf. *United States* v. *Richardson,* 418 U.S. 166, 202-03 (1974) (Stewart, J., joined by Marshall, J., dissenting) (one who claims breach of asserted governmental duty to supply information has standing, as "traditional Hohfeldian plaintiff . . . to litigate the issue of his entitlement").

[42] Where, as here, the ousted member of the public can "champion[ ] his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested," there is no need to apply a "nexus" requirement. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra* at 80-81. Indeed, since a major purpose of such a requirement is to avoid adjudication of rights that others may not wish to assert, that requirement's application is particularly inapposite here. For it is precisely when all participants find secrecy to their mutual advantage that the greatest suspicion of corruption, incompetence, or overbearing arises; it is then that there exists the greatest need for independent review to vindicate the open trial norm of the Sixth Amendment.

In any event, a "nexus" requirement—even if applicable—would be easily satisfied in this case. For as members of the public ousted by closure orders from attending a criminal trial, appellants' status and injury are linked by direct "logical nexus" to the constitutional infringement alleged." *Flast* v. *Cohen, supra,* at 102; *United States* v. *Richardson, supra,* at 175.

It should also be noted that appellants assert no third party rights; nor would the relief sought interfere with any. Neither the defendant, prosecutor, nor trial court has any constitutional right or even "independent interest" in secrecy as such. *Gannett,* 99 S.Ct. at 2907 n.11. Since their only right or interest of a *constitutional* nature is to maintain the trial's fairness, and since the right of an ousted member of the public to attend and observe the trial is consistent with a fair trial, the two rights are reciprocal rather than in conflict.

2. The Norm of Open Trials Cannot Be Remitted to Political Processes.

Nor is this a case where the constitutional violation can or should be left to the political process for correction. The validity of the closure power and its exercise in any particular criminal trial is not one committed by any sensible reading of the Constitution "to the surveillance of Congress [or state legislatures], and ultimately to the political process." *United States* v. *Richardson,* 418 U.S. 166, 179 (1974). Public access to criminal trials surely is not a norm to be defined by majority vote or interest-group compromise. On the contrary—whether viewed as a source of fundamentally personal rights, *cf. Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 736-37 (1964); or as a structural safeguard of the separation of powers, *cf. Buckley* v. *Valeo,* 424 U.S. 1, 109-44 (1976) (per curiam); or as a combination of the two, *cf. United States* v. *Brown,* 381 U.S. 437, 442-44 (1965)—the right of access implicit in the open trial norm is irretrievably lost if it is not "place[d] . . . beyond the reach of majorities and officials." *West*

Virginia State Board of Education v. *Barnette,* 319 U.S. 624, 638 (1943).

But even if one could assume political majorities to be reliably hospitable to the norm of open trials, departures from that norm would tend to be self-insulating. For if trials are closed by agreement of the parties in criminal cases, the same "walls of silence," *Sheppard* v. *Maxwell,* 384 U.S. 333, 349 (1966), behind which "justice cannot survive," *id.; see also United States* v. *Cianfrani,* 573 F.2d 835, 854 (3d Cir. 1978), will prevent the public from ever learning—especially when unreviewable acquittals result—whether various closures were corrupt or otherwise inconsistent with the Sixth Amendment's norms. Unable to learn of abuses, the public will have too little incentive to seek political correctives—and no notion of how such correctives might be designed. And the difficulty goes still deeper. For unless the Sixth Amendment's open trial norms are vigorously enforced, the public can have no assurance that any of the Constitution's *other* guarantees for fair trial and due process of law are being complied with. Like the right to vote, therefore, the right of members of the public to attend criminal trials should be "regarded as a fundamental political right, because preservative of all rights," *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886)—in part because the exercise of this right maintains pressure on government to adhere to legality, but also because, like electoral malapportionment, breaches in the principle of open trials are all but impossible to cure from within.

It is therefore not only entirely appropriate to derive and enforce a constitutional cause of action for members of the public to resist ouster from criminal trials, *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971); it is imperative. Unless an independent right of

action is recognized for expelled members of the public, there will be no means even for this Court to enforce the Sixth Amendment norm of open trials. For when the participants find their joint or several interests served by secrecy—which, in the trial context, is never *required* by fairness—there will be no one to seek independent review unless ousted members of the public may be heard. *See Gannett,* 99 S.Ct. at 2935 (Blackmun, J., concurring in part and dissenting in part).

3. *Gannett* Is Consistent With Judicial Enforcement of Public Access to Criminal Trials.

Gannett neither requires nor implies a contrary rule. The Court's holding explicitly focused on "pretrial proceedings," not on the trial proper. The New York Court of Appeals decision under review was described by this Court as encompassing *only* the question of "exclusion of the press and the public from the pretrial proceeding," 99 S.Ct. at 2904. Moreover, the Court at least twice emphasized that this question of closing certain pretrial proceedings was the only question it had considered and decided. Thus, for example: "[T]he issue here is whether the Constitution *requires* that a pretrial proceeding such as this one be opened to the public. . . ." *Id.* at 2908; *see id.* at 2901, 2913. And the Chief Justice in his concurring opinion pointedly reserved judgment on the issue of trial closures, suggesting that the focus in *Gannett* on *pre*trial proceedings " 'makes . . . *all the difference.*' "[43]

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[43] 99 S.Ct. at 2913, approvingly quoting *Daubney* v. *Cooper,* 5 Manning & Ryland, 314, 316-18 (K.B. 1829). In permitting a spectator ejected from a courtroom to recover for assault and battery, the *Daubney* court wrote:

> [I]t is one of the essential qualities of a Court of Justice that its proceedings should be public, and . . . all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose,—provided they do not interrupt the proceedings, and provided there is no specific reason why

While dicta in *Gannett* may be given a broader reading,[44] the fundamental functional and historical distinctions between a pretrial suppression hearing and a criminal trial proper decisively remove any basis for extending the Court's Sixth Amendment analysis to trials themselves.[45] In most pretrial closure proceedings, enforcement of an independent right of access would pose inherent problems. For the most part, pretrial proceedings are employed to screen out inadmissible or illegally obtained information whose pretrial dissemination in small communities, like that involved in *Gannett,* may at least plausibly be thought ineradicably to taint potential jurors. Harmonizing the competing rights at stake at this pretrial stage, unless judges are permitted "to be overcautious" in the direction of fair trial, *id.* at 2905 n.6, would require that a complex and highly particularistic balance

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they should be removed,—have a right to be present for the purpose of hearing what is going on.

Id. at 3, 10 Barn. & C. 237, 240, 109 Eng. Rep. 438, 440.

[44] *See, e.g.,* 99 S.Ct. at 2911. Such dicta surely need not be elevated into holdings. *See, e.g., McGrath* v. *Kristensen,* 340 U.S. 162, 177 (1950) (Jackson, J., concurring) ("Precedent . . . is not lacking for ways by which a [court] may recede from a prior opinion that has . . . perhaps misled others") ; *Henslee* v. *Union Planters Bank,* 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[45] Indeed, although some lower courts have held the Sixth Amendment's public trial guarantee applicable to various pretrial proceedings if the *defendant* invokes the guarantee, *see, e.g., United States* v. *Cianfrani,* 573 F.2d 835 (3d Cir. 1978), this Court has never decided the question. If, as has been suggested, *see Gannett,* 99 S.Ct. at 2935 (Blackmun, J., concurring in part and dissenting in part), this Court would hold "that not even the accused has a right to a public pretrial suppression hearing," then *Gannett* only decided that, in a proceeding to which the Sixth Amendment's public trial clause is wholly inapplicable, *nobody* can invoke the clause to demand access—hardly a remarkable conclusion, and one that says nothing at all about the existence or nonexistence of a Sixth Amendment right enforceable by members of the public to gain access to criminal *trials.* Indeed, the Court quite plainly recognized that its Sixth Amendment holding would not "necessarily" preclude the existence of such a right. *Id.* at 2909.

be struck between confidentiality and openness. Meaningful review of that balance at the behest of interested members of the public would in most cases prove extremely difficult if not impossible without destroying the very confidentiality that closure was designed to maintain.

By contrast, once the trial has commenced, "inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means." 99 S.Ct. at 2905 (footnote omitted). Thus, not only is the legitimacy and constitutionality of any order closing the entire trial suspect to the point of presumptive invalidity, *see* Parts III & IV *infra*; it is also clear that independent review of *trial* closures, initiated by ousted members of the public, *can* be effective—without sacrificing values as fundamental as the public interest in open trials. The trial court's capacity to insulate the jury from outside information once the trial is underway makes it plain that even the fullest public airing of the supposed reasons for a closure order at the behest of an excluded member of the public need not compromise in the least the right of the accused to an untainted jury.

The Sixth Amendment should therefore be held to guarantee open criminal trials as "a fundamental and essential feature of our system of criminal justice," *id.* at 2923 (Blackmun, J., concurring in part and dissenting in part), binding on the states through the Fourteenth Amendment, *In re Oliver,* 333 U.S. 257 (1948), and enforceable at the behest of excluded members of the public, even when all of the trial's participants opt for secrecy.

C. The Right Is Implicit in the Interdependence of the First and Sixth Amendments.

At a minimum, it is plain that a right of attendance for members of the public is vital both to the public accountability of the participants in the criminal process and to

the public's ability to understand and criticize, and thus to make intelligent choices about, the administration of justice. These twin aims of institutional accountability and public awareness are crucial, in turn, to realizing the distinct core purposes of the Sixth and First Amendments. Thus it would be anomalous in the extreme— and ultimately subversive of our constitutional plan—if, whenever the participants in criminal trials might find it preferable to operate in the dark, excluded members of the public could not assert the one right on which the purposes of both these amendments so heavily depend.

Whatever the true limits of the First Amendment's protection of public awareness, directly affected members of the public could not be deemed to be unprotected against a government policy of conducting criminal trials in secret on the accused's request without admitting a flaw in the Constitution difficult to imagine the Framers of the Sixth Amendment accepting—let alone intending. So, too, whatever other gaps the Sixth Amendment's protection of vigorous prosecution and impartial adjudication might contain, directly affected members of the public could not be deemed to be without any safeguard against a government policy of suppressing information about criminal justice without conceding an omission not readily to be ascribed to the Framers of the First Amendment, and difficult to suppose they could have countenanced.

The very fact of such close interdependence between the aims of the two constitutional provisions as they converge in the context of criminal proceedings renders doubly suspect a constitutional interpretation that would leave so deep a rent in the fabric of the Nation's fundamental law, and strongly counsels a construction that would avoid any such scar. Accordingly, the Court should find in the very "conjunction of liberties" at stake here,

Thomas v. *Collins,* 323 U.S. 516, 531 (1945), and in "the close nexus between the freedoms" involved, *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958), a basis for according special constitutional protection to the right of members of the public to attend criminal trials free of unwarranted governmental interference—regardless of the wishes of the accused or of the trial's other participants. *Cf. Boyd* v. *United States,* 116 U.S. 616, 630 (1886) (interdependence of Fourth and Fifth Amendments); *Stanford* v. *Texas,* 379 U.S. 476, 484-85 (1965) (interdependence of First and Fourth Amendments); *Griswold* v. *Connecticut,* 381 U.S. 479, 482-85 (1965) (interdependence of First, Third, Fourth, and Fifth Amendments); *United States* v. *United States District Court,* 407 U.S. 297, 313-14 (1972) ("convergence of First and Fourth Amendment values").

D. Even if Not Otherwise Enumerated, the Right Is Implicit in Ordered Liberty and Is Among the Rights or Privileges "Retained by the People."

Even if this Court should conclude that the right of members of the public to be present as observers at criminal trials finds insufficiently specific "enumeration in the Constitution," that fact alone could "not be construed to deny or disparage" the existence of such a right, as one "retained by the people." U.S. Const., Amend. IX.

On the contrary, a Ninth and Fourteenth Amendment right, privilege, or immunity of access to criminal trials would follow directly, even without more specific textual enumeration, from the central role of such a right in the "Anglo-American regime of ordered liberty," *Duncan* v. *Louisiana,* 391 U.S. 145, 149-50 n.14 (1968)—a role at least informed, even if not unambiguously guaranteed, by the First and Sixth Amendments, and one undeniably revealed

in "this Nation's history and tradition." *Moore* v. *City of East Cleveland,* 431 U.S. 494, 503 (1977) (footnote omitted). *Cf. Duncan* v. *Louisiana, supra,* 391 U.S. at 148-149 & n.14; *Johnson* v. *Louisiana,* 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring).[46] Just as the expressive "use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens," *Hague* v. *C.I.O.,* 307 U.S. 496, 515 (1939) (opinion of Roberts, J., joined by Black, J.), so, too, the observational use of the Nation's halls of justice has, from time immemorial, been among those same privileges, immunities, rights, and liberties. *See, e.g.,* 3 W. Blackstone, *Commentaries* * 373 (6th ed. 1681); 2 E. Coke, Institutes of the Laws of England * 103 (1765-1769).

Indeed, the right of public access to criminal trials seems an indispensable precondition of the system of government established by the Constitution. No less than the unenumerated right to vote in state elections, *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 665 (1966), the right of access to criminal trials must be "regarded as a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886) (voting). No less than the unenumerated right to proof beyond a rea-

[46] To hold that *due* process of law must be *open* process of law would entail no elevation of a substantive zone of personal autonomy into a newly-recognized right against the majority, *cf. Moore* v. *City of East Cleveland, supra,* 431 U.S. at 537 (Stewart, J., joined by Rehnquist, J., dissenting); *id.* at 549 (White, J., dissenting); it would require little beyond the quintessentially procedural recognition that accessibility to the public is a characteristic "inhering in the institutional process by which justice is administered." *Estes* v. *Texas,* 381 U.S. 532, 588 (1965) (Harlan, J., concurring). For a public trial implies nothing about the permissible *content* of a state's criminal laws or sanctions; it "implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process." *Id.* at 589.

sonable doubt, *In re Winship,* 397 U.S. 358 (1970), the right of access to criminal trials has won "virtually unanimous adherence" throughout our history, reflecting "a profound judgment about the way in which law should be enforced and justice administered." *Id. at* 361-62, quoting *Duncan* v. *Louisiana, supra,* 391 U.S. at 155. Indeed, much like the reasonable doubt requirement, our system of open trials has proven itself "indispensable to . . . the respect and confidence of the community in applications of the criminal law." *In re Winship, supra,* 397 U.S. at 364.[47]

As with the right of interstate travel, *United States* v. *Guest,* 383 U.S. 745, 757-59 (1966), there is thus no need "to ascribe the source of this right . . . to a particular constitutional provision." *Shapiro* v. *Thompson,* 394 U.S. 618, 630 (1969) (footnote omitted). For "the full scope of the liberty guaranteed by the Due Process Clause"—and, one might add, the full scope of privileges or immunities likewise secured by the Fourteenth Amendment—"cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." *Poe* v. *Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). "The tacit postulates" of the constitutional plan "are as much engrained in the fabric of the document as its

[47] Where the state forbids any extrajudicial resolution of a particular dispute, this Court has held that only the litigant's unimpeded access to court can make the state's "monopoly over techniques for binding conflict resolution . . . acceptable under our scheme of things." *Boddie* v. *Connecticut,* 401 U.S. 371, 375 (1971) (indigent divorce plaintiff entitled by due process to waiver of court costs). So too, the state's monopoly, through the criminal law, over the legitimate use of force, *see Ogden* v. *Saunders,* 25 U.S. (12 Wheat.) 213, 346-47 (1827) (Marshall, C.J., joined by Duvall and Story, JJ., dissenting), is acceptable only because all have access to criminal trial courts. For the victims of violent crimes, for example, the legitimacy of insisting that official prosecution replace private vengeance is ultimately linked to the victim's ability to enter the courthouse to see justice done.

express provisions." *Nevada* v. *Hall,* 99 S.Ct. 1182, 1195 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting).

Thus, the right of the individual to attend and observe any criminal trial, subject only to narrowly focused restraints to assure fairness, order, and other overriding values, is "of constitutional dimension because [its] derogation would undermine the logic of the constitutional scheme," *id.* at 1197—a logic that inescapably entails publicity and openness in the state's ultimate confrontations with its citizens, when life and liberty are at risk. Whatever may be deemed its precise textual source, the right to attend criminal trials is confirmed by our "shared experience and common understanding," *id.* at 1194, an experience and understanding critically shaped but neither wholly defined nor fully expressed by the First and Sixth Amendments.

Our "common understanding," *id.,* warns that we dare not rely solely on appellate review to expose abuses of judicial or prosecutorial power—whether those abuses occur with the complicity of an accused who purposely seeks the cover of secrecy, or with the reluctance of an accused subtly pressured to waive without protest the protection of publicity. Moreover, some secret trials, like the one in the instant case, will end in nonappealable acquittals. Even where appeals are possible, much judicial and prosecutorial misconduct will either be insulated from correction by such doctrines as harmless error, or remain hidden because visible only through the pattern revealed by a series of individual cases.

Nor can we depend wholly on the preparation of post-trial transcripts to bring the truth to light. As already noted, few can afford this expense—even after a relatively short trial. Moreover, the delay alone will often make the record stale, and matters like credibility are forever lost

when only a cold transcript is available. Indeed, secret trials automatically defeat the right of neighbors, friends and relatives—not only the accused's but the victim's—to judge for themselves who was lying and who was telling the truth.

More fundamentally, our "shared experience," *id.,* teaches that the very spectre of secret trials is a source of public terror. The state's bland assurance that anyone accused of crime is free to demand a public proceeding offers scant comfort to those who wonder how genuine that freedom truly is or how costly its exercise might be made, and hardly reassures those who fear less that they will be unable to obtain an open trial than that the criminal law itself—what it proscribes, how it is enforced—is destined to remain a mystery until the day they discover that they too have been accused.

Experience also teaches that secret trials encourage corruption and abuse of power, spawning both the reality and the appearance of manipulation. Neither confidence in the administration of justice, nor a system of justice worthy of confidence, would long survive a scheme in which the trial's participants were empowered, by mutual agreement, to conceal each other's crimes.[48]

By avoiding secret trials, we have not only minimized these evils; we have also become known to the world as an informed and free people. Indeed, our political and legal history has been significantly shaped by the criminal trials our people have watched, reported, and relived. Imagine an America in which secret trials had been held in the prosecutions of Aaron Burr, John Peter Zenger, or John Thomas Scopes; of James Earl Ray, Sirhan Sirhan,

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[48] *Cf. United States* v. *Nixon,* 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure . . . ").

or Arthur Bremmer; of the Chicago Eight, the Watergate Seven, or the Wilmington Ten.

Nor need one focus on such historic trials to recognize the crucial importance of public access to criminal trials even in wholly non-political contexts. This very case makes the point with force: A man is tried in a small town for the murder of a local hotel manager; the case drags through three open trials; then a fourth trial is held—behind closed doors. Suddenly, the jury is excused and the defendant set free. Can there be any doubt that not only those close to the victim, but all members of the community, are bound to feel cheated of something they had always supposed was theirs—the simple right to *see* justice done?

Given the well founded "traditional Anglo-American distrust for secret trials," *In re Oliver,* 333 U.S. 257, 268 (1948), we can assure neither the accountability of government, nor any reasonable confidence that the guilty are indeed being punished and the innocent set free, if entire criminal trials may be closed. Membership in the political community, given our form of government, thus entails a specially protected "liberty" interest in access to criminal trials by members of the public—an interest whose abridgment requires "particularly careful scrutiny," *Poe* v. *Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), an interest that certainly cannot be sacrificed at the altar of secrecy, either on whim or in gross.

It follows that our right to attend criminal trials—to watch as silent observers the necessarily public drama of criminal justice—is secured not only by the texts of the First and Sixth Amendments, and not only as an interstitial inference from those two provisions taken together, but also as a cornerstone of the Constitution's fundamental structure.

Without that right, none of the other guarantees of liberty or of the rule of law could be assured. Both because the right has been honored by centuries of Anglo-American practice, and because its denial would leave a treacherous and ultimately unendurable void in our constitutional scheme, that right must be counted among those "retained by the people." [49]

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[49] It should be added that, based on a multiplicity of constitutional sources, a presumptive right of members of the public to attend criminal trials has *already* been recognized by a majority of this Court. Four members of the Court, relying on the Sixth and Fourteenth Amendments, would "require an accused who seeks closure to establish that it is strictly and inescapably necessary in order to protect the fair trial guarantee." *Gannett,* 99 S.Ct. at 2936 (Blackmun, J., joined by Brennan, White and Marshall, concurring in part and dissenting in part). Another Member of the Court, relying on the First and Fourteenth Amendments, would find a "right of access to courtroom proceedings . . . limited [only] . . . by the constitutional right of defendants to a fair trial . . . . and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." *Id.* at 2915 (Powell, J., concurring). Despite the characterization of this grouping of Justices as "an 'odd quintuplet,'" *id.* at 2919 n.2 (Rehnquist, J., concurring), there is nothing unique about constitutional principles resting on divergent theoretical analyses. *See, e.g., Apodaca* v. *Oregon,* 406 U.S. 404 (1972); *Johnson* v. *Louisiana,* 406 U.S. 356 (1972); *Oregon* v. *Mitchell,* 400 U.S. 112 (1970). Indeed, this Court only recently declared its "institutional duty" in the face of such theoretical disagreements "to follow until changed the law as it now is, not as some Members of the Court might wish it to be." *Hudgens* v. *NLRB,* 424 U.S. 507, 518 (1976). Under the constitutional *standard* espoused by a majority of this Court in *Gannett*—whatever the varying *theories* underlying that standard—it is clear that the Constitution imposes upon the state a heavy burden of justification where, as here, the press and the public have been excluded from a criminal trial and stand threatened with repeated exclusion.

III.

As Construed and Applied by the Court Below to Authorize Summary Expulsion of the Public for the Duration of a Criminal Trial, the Virginia Closure Statute Violates the Constitution's Guarantees That Criminal Trials Will Be Open to Public Attendance and Observation.

Because the right of access to criminal trials is among "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society," *Kovacs* v. *Cooper,* 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), that right "come[s] to this Court with a momentum for respect lacking when appeal is made to [less basic and enduring] liberties." *Id.* As such, the right of access to criminal trials must be protected from any risk of unconstitutional infringement by a shield of procedural safeguards and substantive standards founded on the principle that this fundamental right is susceptible of limitation only when, and only to the degree that, it unavoidably clashes with some other equally transcendent value.

Even with regard to the closure of pretrial suppression proceedings, whose "whole purpose . . . is to . . . insure that [unreliable or illegally obtained] evidence does not become known to the jury," *Gannett,* 99 S.Ct. at 2905, this Court made clear that secrecy was tolerable precisely because the values of openness could be "outweighed by the defendant's right to a fair trial." *Id.* at 2912; *id.* at 2915-16 (Powell, J., concurring); *id.* at 2936 (Blackmun, J., concurring in part and dissenting in part). But, as the Court made equally clear, there is no unavoidable clash between the constitutional norms of open and fair trials once the trial itself has begun, given the "variety of means"

short of secrecy that are always available "[a]fter the commencement of the trial" to prevent unfairness. *Id.* at 2905 (majority opinion).[50] Indeed, publicity *promotes* the aims of a fair trial—even if not always the perceived self-interest of its participants—just as publicity may *defeat* the aims of a pretrial suppression hearing.

A. Orders Closing Entire Criminal Trials Must Overcome An All-But-Conclusive Presumption Of Constitutional Invalidity.

Given the purposes and effects of orders closing judicial proceedings, the costly case-by-case task of judging future closure orders that might be issued in the name of fairness, *cf. id.* at 2916-17 (Powell, J., concurring); *id.* at 2936-39 (Blackmun, J., concurring in part and dissenting in part), would almost certainly only confirm what history has already shown beyond doubt: that closing an entire criminal trial is *never* legitimate, because it is never necessary. That lesson, in turn, implies an all-but-conclusive presumption: that an order excluding the public from an entire criminal trial is unconstitutional.

If ever a trial court thinks it appropriate to test this presumption in a particular case, such a test must conform strictly to standards and procedures permitting of no mistaken or ill-motivated lurch to secrecy. The "over-caut[ion]" that may lead courts to impose closure orders which are not strictly necessary may be acceptable at the *pre*trial stage, *id.* at 2905 n.6, given the "special risks" of

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[50] These include continuance, severance, change of venue, *voir dire,* peremptory challenges, sequestration, admonition of jurors or of witnesses, exclusion of witnesses from the courtroom except during their own testimony, expulsion of unruly spectators, and others. *See, e.g.,* ABA Project on Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press Standard 8-3.2 (App. Draft 1978). *See also Nebraska Press Ass'n* v. *Stuart, supra,* 427 U.S. at 562-65; *Sheppard* v. *Maxwell, supra,* 384 U.S. at 354 n.9, 358-62.

irremediable prejudice from dissemination of unreliable or illegally obtained evidence to potential jurors in a small community. *Id.* at 2905; *id.* at 2915-16 (Powell, J., concurring). But at the *trial* stage, where a battery of remedies short of closure can be deployed to avoid such risks, excessive caution spells constitutional overkill when it leads to an order ousting the public from an entire trial.

This Court's First and Sixth Amendment decisions establishing the standards and procedures that are required to protect rights no more fundamental than the right at issue here provide a blueprint for the structure of safeguards that should be put in place to prevent any constitutionally unjustifiable encroachment upon the domain ruled by the right to an open and public trial.

First, no closure order, however limited in duration, should ever be considered except to meet the state's duty to assure the defendant a fair trial, or another equally compelling objective. *Id.* at 2936 (Blackmun, J., concurring in part and dissenting in part); *cf. Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1968); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963); *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960); *Thomas* v. *Collins,* 323 U.S. 516, 520 (1945); *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942).

Second, no closure order should be considered absent convincing evidence on the record that the degree of secrecy imposed by the order is required to prevent a clear and present danger of irreparable damage to a concern as fundamental and compelling as fair trial. *See Gannett,* 99 S. Ct. at 2937 (Blackmun, J., concurring in part and dissenting in part). If an order is requested that would bar observers for the entire duration of the trial, this requirement of course implies that orders of more limited duration must be preferred absent a powerful showing that only the more extreme option would suffice. *See id.* at 2939.

Third, no closure order should be considered absent convincing evidence and explanations on the record demonstrating that no means less drastic than excluding the public—such as jury sequestration or a change of venue—could adequately protect fairness or serve whatever other compelling objective the closure order would have been designed to advance. *Id.* at 2937. *See also Sherbert* v. *Verner, supra,* 374 U.S. at 407; *Shelton* v. *Tucker,* 364 U.S. 479, 487-90 (1960); *Talley* v. *California,* 362 U.S. 60, 64 (1960); *Schneider* v. *State,* 308 U.S. 147, 161, 164 (1939).

Fourth, no closure order should be considered without convincing evidence and explanations on the record demonstrating a very high probability that the order will in fact prove effective in protecting against the perceived harm. *Cf. Gannett,* 99 S.Ct. at 2937 (Blackmun, J., concurring in part and dissenting in part); *Nebraska Press Ass'n* v. *Stuart, supra,* 427 U.S. at 565-67; *New York Times Co.* v. *United States, supra,* 403 U.S. at 733 (White, J., joined by Stewart, J., concurring).

Fifth, no closure order should be considered unless affected members of the public are given a fair and timely opportunity to be heard in response and to obtain expedited judicial review if they protest to no avail. *Cf. Blount* v. *Rizzi,* 400 U.S. 410, 421 (1971). If it is known in advance that a closure order will be entertained at a given time and place, or if it reasonably could have been known, then the public should be given some correspondingly prior notice. *Cf. Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Board of Regents* v. *Roth,* 408 U.S. 564, 575 n.14 (1972); *Baldwin* v. *Hale,* 68 U.S. (1 Wall.) 223 (1864). In any event, anyone removed from the court under a closure order should be notified *at that time* of the right to an immediate, informal hearing. And if a closure motion is made in such a way that interested members of the public would have no reason to be aware of the matter,

then at least a short delay should be provided during which reasonable public notice may be given. To permit a closure order to take effect, and a trial to proceed in secret, while excluded individuals or potentially interested members of the public remain unaware either that the trial is in progress or that they have a right to contest its closure, is to sanction, for reasons of sheer convenience, the irreversible loss of the rights and values that open trials serve. *See* Part II *supra.*

Sixth, once a closure order has been issued, interested members of the public must be promptly informed of the grounds on which it was issued, including the reasons for rejecting less extreme measures. Legitimately confidential information obviously need not be disclosed in open court—although a record of *in camera* proceedings must be available under appropriately secure conditions to assure meaningful appellate review of any closure order that may issue.

Seventh, throughout any period during which a criminal trial has been closed to the public, the court should "ensure that an accurate record is made of [the] proceedings . . . and that the public is permitted proper access to the record as soon as the threat to the defendant's fair trial right has passed." *Gannett,* 99 S.Ct. at 2939 (Blackmun, J., concurring in part and dissenting in part). Although no after-the-fact recording or transcript can substitute for the opportunity to observe a trial in progress, *see* Part II-A(3) *supra,* no record at all is obviously worse. Failure to assure that the fullest and most accurate possible record is in fact preserved, and to make such a record available at public expense[51] at the earliest possible mo-

[51] Just as it would almost certainly be unconstitutional to charge a fee for the "privilege" of exercising the basic right of attending and observing a trial, *cf. Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943),

ment, constitutes a completely gratuitous sacrifice of a basic constitutional right.

Eighth, and finally, closure orders cannot be tolerated when issued pursuant to open-ended delegations of discretionary power, exercised with the equally discretionary acquiescence of the prosecution upon the motion of the accused. *See Cox* v. *Louisiana, supra,* 379 U.S. at 557-58; *Saia* v. *New York,* 334 U.S. 558, 560-62 (1948); *Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940); *Lovell* v. *Griffin,* 303 U.S. 444, 450-53 (1938). *Cf. Furman* v. *Georgia,* 408 U.S. 238 (1972). As with uncontrollable discretion generally, that conferred by a standardless closure scheme represents both an abdication of the public power to make explicit choices of policy, *see McGautha* v. *California,* 402 U.S. 183, 248-87 (1971) (Brennan, J., dissenting), and an invitation to abridge the rights of would-be trial observers for plainly impermissible and permanently invisible reasons.[52]

B. The Virginia Closure Statute Utterly Fails To Overcome That Presumption.

Without doubt, the Virginia Closure Statute invoked by the trial court and defended before and sustained by the Virginia Supreme Court in this case,[53] flagrantly violates

at least where the cost would be prohibitive for the individual who seeks access, *cf. Lubin* v. *Panish,* 415 U.S. 709 (1974); *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), so too it would appear to be impermissible to limit post-closure access to those who could afford to buy a transcript. *Cf. Griffin* v. *Illinois,* 351 U.S. 12 (1956).

[52] That the scheme of Va. Code § 19.2-266 also reposes in the accused a power to *prevent* a secret trial cannot save it from this constitutional infirmity; from the perspective of members of the public who wish to attend the trial, this is simply a delegation, to a self-interested private party, of unbridled control over a fundamental constitutional right. *Cf. New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.,* 99 S.Ct. 403, 420 (1978) (Stevens, J., dissenting).

[53] *See* Part I-A *supra.*

even the most minimal conception of the standards and procedures required for the protection of the open trial right. Indeed, of the eight requirements described above, not one is met by Va. Code §19.2-266, as written or as construed and applied in this case.

By its terms, Va. Code §19.2-266 invites trial judges to act as the trial court in Stevenson's case did: exercising completely unrestricted discretion, in virtually summary fashion, to close whole trials for the trifling convenience of proceeding in secret. The only "hearing" that was provided any member of the public took place after a full day of secret proceedings—half way through the trial. No notice was given anyone, before or after closure, of what was about to happen or of what had occurred. The only recording made was one that can barely be understood, and can be transcribed only at a court reporter's convenience and at private expense.[54] The court conducted no inquiry into the supposed need for the order or into such an order's efficacy, and gave no consideration whatever to less drastic alternatives. To the contrary, in proceeding as it did, the court was complying fully with the unreigned spirit of blanket authority conferred by Va. Code §19.2-266.[55]

One criterion of the statute stands out: persons may be expelled from the courtroom if their "presence would impair the conduct of a fair trial." But as the statute's meaning is revealed through its application in this case, that language goes far beyond authorizing the exclusion of witnesses while others testify, *see Johnson* v. *Commonwealth,* 217 Va. 682, 232 S.E.2d 741 (1977); *Yorke* v. *Com-*

[54] *See* n.37 *supra.*

[55] *See* n.7 *supra.* Indeed, the state itself insisted below that the closure of Stevenson's trial pursuant to Va. Code § 19.2-266 was not only fully authorized by that provision; it was entirely "justified." Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition at 17.

monwealth, 212 Va. 776, 188 S.E.2d 77 (1972); or authorizing the removal of a disruptive individual or an unruly mob; or authorizing the removal of individuals as to whom, or in circumstances as to which, a particular danger of prejudicing the defendant's trial has been shown likely.

In fact, the language authorizes the removal of all spectators—friends, relatives, journalists, strangers—however few and orderly, *on the simple theory that the presence of people other than the trial's participants might somehow spoil matters.* Although counsel for defendant made several nebulous and unsupported suggestions as to how this might occur,[56] all the trial court offered by way of explanation in invoking the statute was that "the defendant has made the motion" (A. 6a). And all the trial court offered of an explanatory character in refusing to vacate the closure order later the same day was that, given the "layout of the Courtroom," it might be that "having people in the Courtroom is distracting to the jury" (A. 16a).

The Virginia Closure Statute has thus been construed to authorize closing an entire criminal tral in the name of "fairness" on the sole grounds that the defendant would like the trial closed, and that the bare fact of being observed—since no concrete distraction was suggested—might prevent jurors from rendering a fair verdict, or prevent witnesses from giving proper testimony.

Needless to say, both grounds are flatly inconsistent with the very existence of any right at all in members of the public to observe a trial: Virginia's premise—that public trials are unfair trials—directly contravenes the premises of the Constitution.

No law so interpreted and enforced as the Virginia Closure Statute has been in this case could possibly be

[56] *See* Part IV *infra.*

reconciled with the existence of a right to observe criminal trials. And even if the statute had not been given so extreme a reach, its failure to meet any of the substantive or procedural requirements derived above from this Court's First and Sixth Amendment cases would suffice to render the statute clearly unconstitutional.

IV.

Regardless of the Statute or Rule Invoked to Expel the Public From the Criminal Trial in This Case, That Expulsion Was Both Procedurally and Substantively Unconstitutional and Illustrates the Need for This Court to Articulate Clear Limits on the Use of Closure Orders.

If we begin with the all-but-conclusive presumption that an order excluding the public from an entire criminal trial is unconstitutional, *see* Part III-A *supra*, then the order in this case was surely void. For there was nothing even remotely unusual about the case, its background, or the context of the trial—nothing to suggest that the ordinary harmony between an open trial and a fair trial could not obtain.

The record contains only two hints of anything even faintly different about this case. First, the trial court referred to the courtroom's "layout" and suggested that having people there might be "distracting to the jury." (A. 16a). In fact, there was nothing about this courtroom (*see* Exhibits A and B *infra*) that could possibly warrant departure from the open trial norm. Although of modest size, the courtroom is of classic design; built in 1735, it has doubtless served as a model for literally hundreds of other courts throughout the Nation. In any event, why this courtroom's "layout" should suddenly have seemed a

problem—after it had been used to conduct public criminal trials for nearly two-and-a-half centuries—was not explained. The trial court was surely right in its conclusion: "[M]aybe that's not a very good reason" (*Id.*).

Second, there were references to the fact that this was Stevenson's third retrial (A. 14a-16a), and a suggestion that secrecy might somehow decrease the risk of having to endure a fourth—or at least would spare Stevenson's attorney the bother of "keep coming back up to the Court" to defend his client. (A. 15a). If anything, of course, this factor cuts against closure rather than for it. Given the prior trials and the publicity they generated (A. 34a, 35a), it is difficult to see what could possibly have been accomplished by stemming the flow of information from the third replay. Indeed, the very notion that shutting out the public might make it easier to bring the saga of John Paul Stevenson to a more rapid end is suggestive of precisely what open trials are designed to avoid: clandestine arrangements that the trial's participants would fear to make in the light of day.

With these two hints of the unusual removed as possible justifications for closure, we are left with virtually nothing to support the action of the courts below. For not even the most generous interpretation of the concerns alluded to by defense counsel—that jurors might read the papers (A. 15a), or that witnesses might talk to court-watchers (A. 5a)—could possibly have amounted to justification for conducting a murder trial behind closed doors.

Moreover, in response to the concerns defense counsel mentioned, counsel for appellants suggested the possibility of sequestering the jury, *see* Va. Code §19.2-264, and excluding or admonishing witnesses (A. 9a-13a). Defense counsel simply asserted "[t]here's no way" to prevent jurors from reading the papers or watching television (A. 15a), and

said not a word about the device of sequestration. In ruling that the press and the public should be expelled, the trial court likewise said nothing about the availablity or efficacy of any of the less drastic means that had been suggested. As one would expect, the usual devices, *see* n.50 *supra,* were in fact more than ample to remove any risk that openness seemed to pose for fair trial—yet the trial court ordered closure, without explaining its use of a bludgeon when not even a scalpel was necessary.

Nor was the bludgeon even likely to accomplish its intended purpose. For banishing the press and the public was a patently ineffectual answer to the vague concerns defense counsel voiced. That jurors might learn through press reports what others thought about the proceedings remained as great, or as small, a danger after the closure as before, since jurors were not prevented from discussing the case with others outside the courthouse. Any danger of prejudicing a possible future jury could hardly have been stilled by closure, since details about the trial could have been spread, by the jurors then impanelled, to prospective jurors in any future trial. In any event, the trial court did not even advert to the question of efficacy. As with the issues of need and alternatives, it seemed sufficient that closure was something defense counsel wanted, and something Va. Code §19.2-266 allowed.

The constitutional defects in the procedure by which this extraordinary order was entered in this all-too-ordinary case have already been set forth. *See* Part III *supra.* One can only conclude that, even if the presumption against trial closure were far weaker than it in fact is, what the trial court did in this case—and what the Virginia Supreme Court approved on the authority of *Gannett*—was a blatant violation of the rights secured by the Constitution to appellants and to the many others in Hanover

County who had an interest in seeing—and a ***right*** to see—how the guilt or innocence of John Paul Stevenson would finally be resolved.

Yet there is not the slightest reason to suppose that the trial judge who expelled the public from his courtroom in order to decide Stevenson's fate in secret, or the judges of Virginia's highest court who upheld the closure authority thus exercised, are less sensitive to the premises of an open society than countless others in similar situations would be. The simple explanation is that it is easier, may seem kinder, and no doubt has appeared safer, to err without pause on the side of the accused. But once the legitimacy of conducting entire trials in secret—something few would previously have found thinkable—is accepted, the number of closure requests by defendants in criminal cases will certainly mount, and neither prosecutors nor trial judges will have as much reason to resist as to go along. Given the self-accelerating character of departures from the norm of open trials, *see* Part II-B(2) *supra,* the norm of openness could well be replaced, in time, with a norm of secrecy. And one of "the indispensable conditions of an open as against a closed society," *Kovacs* v. *Cooper, supra,* at 95 (Frankfurter, J.), would be in grave peril.

CONCLUSION

The case from which this appeal arises began in the courthouse where Patrick Henry's name first appeared upon the pages of American history. To a courthouse crowded with an overwhelming multitude, he raised his voice in defense of liberty. How different was the trial of John Paul Stevenson, held in the same courthouse—emptied of all observers—more than 200 years later. If upheld on appeal, the judgments of the Virginia Supreme

Court sustaining that secret proceeding would entomb our courts in crypts of silence and put liberty itself at risk throughout the land. For this and for all the foregoing reasons, the judgments of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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• Counsel for appellants acknowledge the assistance of David H. Remes, J.D. 1979, in the preparation of this brief.

EXHIBITS A & B

Exhibit A

Hanover County Courthouse
Hanover, Virginia

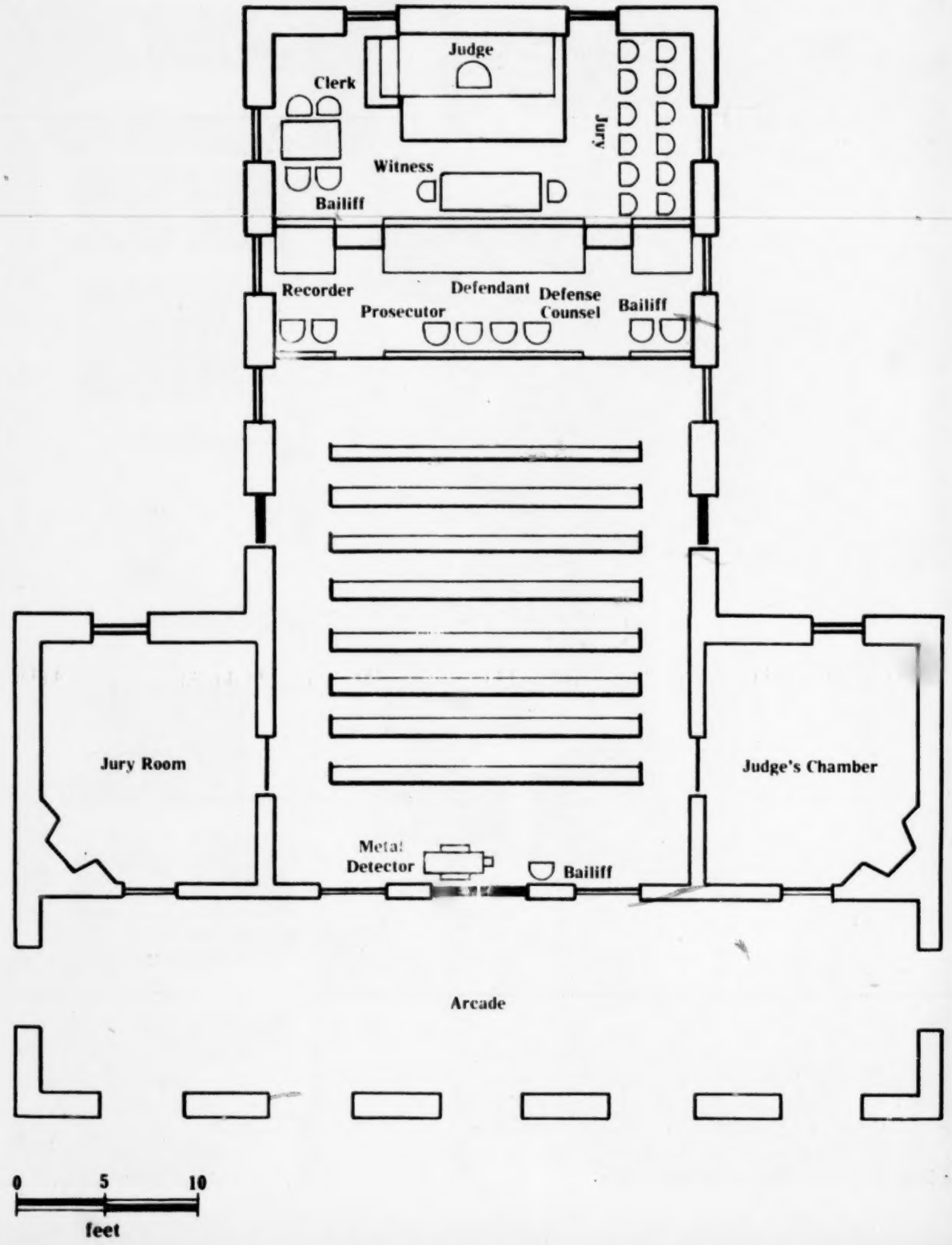
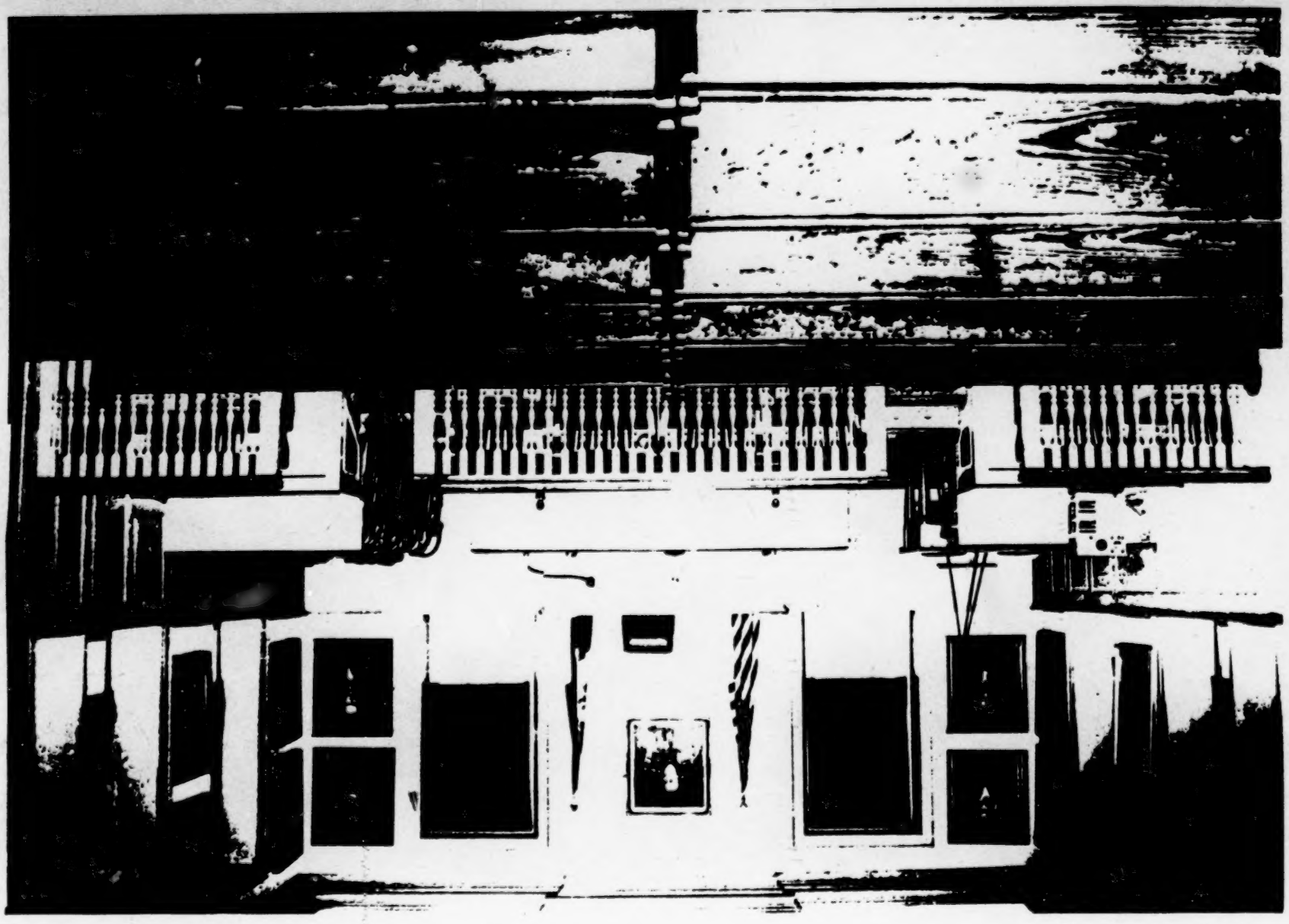


Exhibit B



Supreme Court, U. S.
FILED
JAN 9 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants,*

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants.*

RICHARD H. C. TAYLOR,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants.*

RICHARD H. C. TAYLOR,

Appellee.

On Appeal from the Supreme Court of the Commonwealth of Virginia

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In The

Supreme Court of the United States

October Term, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants,*

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants.*

RICHARD H. C. TAYLOR,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,

v. *Appellants.*

RICHARD H. C. TAYLOR,

Appellee.

On Appeal from the Supreme Court of the Commonwealth of Virginia

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BRIEF ON BEHALF OF THE APPELLEES

QUESTIONS PRESENTED

1. Whether the constitutional validity of Va. Code § 19.2-266 was sufficiently drawn in question to support this Court's exercise of appellate jurisdiction under 28 U.S.C. § 1257(2).

2. Whether the circumstances of this case provide an adequate basis upon which this Court should grant a writ of certiorari under 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.
3. Whether the First Amendment affords the public or press a right to attend criminal trials.
4. Whether the Sixth Amendment embodies a public right of access to criminal trials.
5. Whether the First and Sixth Amendment taken together afford a public right of access to criminal trials.
6. Whether the trial court gave appropriate deference to any constitutional right of access to criminal trials in its decision to close the trial.

STATEMENT OF THE CASE

John Paul Stevenson (hereinafter, "Stevenson") was indicted for murder in March of 1976 and was convicted in the Circuit Court of Hanover County (hereinafter, "trial court") on July 16, 1976 of second degree murder.[1] On October 7, 1977 the Supreme Court of Virginia reversed this conviction and remanded the case for a new trial. *Stevenson* v. *Commonwealth,* 218 Va. 462, 237 S.E.2d 779 (1977). The conviction was reversed because a blood stained shirt purportedly belonging to Stevenson was improperly admitted into evidence. Laboratory tests had revealed that the stains on the shirt matched the blood of the victim. The Supreme Court of Virginia found that this shirt was improperly received in evidence at the original trial because it was "connected" to the accused solely by hearsay evidence. *Id.*[2]

[1] As noted in the Jurisdictional Statement of the Appellants, at page 7, the statement of facts contained in Appellants' Memorandum in Support of Petitions for Writs of Mandamus and Prohibition before the Virginia Supreme Court was accepted by counsel for appellee. Such agreement on the facts is not possible before this Court due to the argumentative nature of the Appellants' statement of the case.

Stevenson's second trial ended in a mistrial on May 30, 1978 (Va. App. 3),[3] because a juror asked to be excused due to a nervous condition. (App. 34a). A newspaper article published by the Richmond *Newsleader* the day following the declaration of the mistrial explained that Stevenson had been previously convicted, that a new trial had been ordered by the Virginia Supreme Court because of improper admission of a "key piece of evidence" at the original trial—"a blood stained shirt obtained from Stevenson's wife soon after the killing." (App. 34a).

A third trial began on June 6, 1978, but that proceeding also ended in a mistrial. (Va. App. 4). A mistrial was declared in this instance because a prospective juror had read about Stevenson's previous trials and had related his knowledge about the case to the other prospective jurors. (App. 35a-36a). A Richmond *Newsleader* article published the day following the second mistrial stated that Stevenson had been convicted previously and that the conviction was overturned because of evidence improperly introduced during the original trial. (App. 35a-36a).

Stevenson's fourth trial began on September 11, 1978. At the outset, Stevenson's defense counsel moved to exclude the public and press from the courtroom during the trial "because I don't want any information being shuffled back

[2] The prosecution did not attempt to introduce the blood stained shirt at the subsequent re-trials but the existence of this inadmissible and highly prejudicial evidence was publicized in the newspapers at the time of the second trial. (App. 34a).

[3] Page number references to the Appendix filed by the Appellants in the Virginia Supreme Court in these consolidated cases will be designated (Va. App. . . .) to distinguish such references from the Appendix filed with this Court.

and forth when we have a recess as to what—who testified to what." (App. 5a). The Commonwealth's Attorney did not object to the proposed closure. (App. 6a). The trial court granted the motion stating that "the statute gives me that power specifically and the defendant has made the motion and I'll rule that the courtroom be kept clear of all parties except witnesses when they testify." (App. 6a). Appellants Wheeler and McCarthy, who were present in the courtroom, were required to leave, but the record reflects no objection on their part at that time. (App. 5a-6a). Later that same day, counsel for Appellants was granted an opportunity to oppose the motion and order closing the trial to the public and press. Written and oral arguments were presented by counsel urging the court to open the trial to the press and public. (App. 8a-15a). Appellants counsel argued that the exclusion order was a form of prior restraint on freedom of the press in violation of the First Amendment. (App. 8a-12a). Appellants also suggested that other measures were available to ensure a fair trial. (App. 12a). Appellant's counsel made no challenge to the constitutionality of Va. Code § 19.2-266.

Stevenson's defense counsel argued that "this is the fourth time that we've . . . attempted to have a trial", that "we've had difficulty . . . with information . . . between jurors," and that "on two previous occasions your honor declared a mistrial and that was the reason why I wanted to avoid [continually] coming back up to this Court and . . . having to try this case." (App. 14a-15a). Stevenson's counsel further contended that a courtroom open to the press and the public would jeopardize his client's right to a fair trial in that publicity was a particularly acute problem in such a small community. (App. 15a).

The trial court stated that it had "to weigh, . . . in its own

mind, . . . the rights of the defendant as against the rights of the public or the rights of the defendant as against the rights of the press." (App. 12a-13a). Judge Taylor also noted that the courtroom layout was such that spectators tended to be distracting to the jury. (App. 16a). Considering the circumstances presented and the factors raised by counsel at this mid-trial hearing,[4] Judge Taylor declined to vacate his closure order. (App. 17a).

The Appellants petitioned the Supreme Court of Virginia for Writs of Mandamus and Prohibition and filed an appeal from the closure order. The Court denied relief in all three cases, citing without comment *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979). (App. 24a-28a).

The instant appeal is from those judgments of the Supreme Court of Virginia. Appellants attack the constitutionality of Va. Code § 19.2-266 for the first time in this Court.

SUMMARY OF ARGUMENT

I.

To establish appellate jurisdiction in this Court, it has long been required that there be an explicit and timely insistence in state courts that a state statute is repugnant to the federal Constitution, treaties or laws, of the United States. A general attack on the constitutionality of actions under a statute does not meet this jurisdictional requirement. Not once in Virginia courts did the Appellants even mention Va. Code § 19.2-266, let alone challenge its constitutionality. Such failure, of itself, prevented not only constitutional review of the statute in the Supreme Court of Virginia, but, also makes such review improper in this Court.

[4] Though not perfectly clear from the record, this hearing on closure took place after the completion of the first day of trial and after the jurors had been released for that day.

Certiorari is not an appropriate alternative in this case. Its grant would virtually nullify the appellate jurisdiction requirement that only the federal questions raised and decided below may be considered by this Court. Moreover, such a grant of certiorari would be in complete derogation of the principles of comity. The invitation to establish a right of access to criminal proceedings in light of this Court's recent decision in *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979), should be declined in order that state courts and legislatures may react to the effects of *Gannett* perceived by appellants. To establish a new constitutional right of public access after only six months experience under *Gannett,* without any credible data on its effects, is not warranted. If such a constitutional requirement is truly necessary, that will become apparent once the States have had an adequate time to consider this issue and to render their judgment upon it. This Court should not establish new constitutional rights where the need is not proven and the consequences are unknown.

II.

The traditionally recognized First Amendment rights are not in issue in this case. The Appellants assert a First Amendment right of access—the right to attend criminal trials. The decisions of this Court have uniformly rejected claims that the First Amendment guarantees either the public or press a right of access to governmental places and information. Recognition of such rights of access would present significant practical problems which do not lend themselves to resolution by means of any reasonable constitutional principle.

Our tradition of public criminal trials, though well established, does not thereby create a constitutional right in

the public or press to demand public trials. Indeed, the custom of publicity suggests there is no pressing need to recognize the novel rights of public access asserted by the Appellants in this case.

The central purpose of criminal trials is fair adjudication of the accused. Trial closures, where deemed necessary by the accused, prosecutor and judge to ensure a fair trial would not disserve the central societal purposes of criminal trials. Accordingly, there is no discernible basis upon which to establish a public right of access to criminal trials.

III.

Similarly, the Sixth Amendment embodies no public right of access to criminal proceedings. While there exists a common law tradition of open civil and criminal proceedings, this Court in *Gannett* refused to ascribe constitutional dimension to this tradition, finding no evidence that the framers of the Sixth Amendment intended to create any Constitutional right of access in the public.

In any criminal proceeding, the ultimate concern is for the accused's right to a fair trial, the most fundamental of all freedoms. Thus, this right of the accused is paramount to any societal interest in a public trial. While the press should normally have the opportunity to observe judicial proceedings, that opportunity must yield whenever necessary to maintain absolute fairness in the judicial process. To ensure such fairness, trial judges have an affirmative duty to protect the rights of the accused and rightfully possess broad discretion in fulfilling this obligation.

The public also may have important interests in criminal trials but recognition of such interests is a far cry from the creation of a constitutional right on the part of the public

to attend criminal proceedings. Moreover, in an adversary system of criminal justice the public interest is protected by the trial participants. The workability of our system is based upon the assumption that these participants will competently and honestly meet their responsibilities. The responsibility of the prosecutor fully encompasses a duty to protect the societal interest in a public trial.

At times trial closure will be necessary to protect the accused's right to a fair trial. Any public concern in limiting the use of such closures can be adequately protected by the political process and does not justify creation of new constitutional rights.

IV.

Neither the First nor the Sixth Amendment alone provides a basis for a public right of access to criminal trials. Nor do these Amendments taken together support such a right. Since First and Sixth Amendment rights are not interdependent and are often in conflict in criminal trials, the cases relied upon by Appellant are inapposite.

V.

Even if a Constitutional right of access exists, the trial court gave this right all appropriate deference in balancing it against the accused's right to a fair trial. Though no objection by the Appellants was made to the closure order, the trial court nevertheless afforded them a mid-trial hearing. The court assumed the public had a constitutionally protected right to attend, but found that the right of the accused to a fair trial outweighed Appellants' interests. Though alternatives to closure were suggested by Appellants, they obviously were no longer viable under the circumstances. Substantial reasons were advanced in support

of closure, yet Appellants offered no countervailing evidence to overcome these bases for closure.

The "all-but-conclusive" presumption against closure urged by the Appellants is unworkable and would, in effect, prohibit all closures. The trial courts balancing of the competing interests herein was constitutionally adequate.

ARGUMENT

I.

THE CASE IS NOT PROPERLY BEFORE THE COURT ON APPEAL, AND THE COURT SHOULD NOT GRANT CERTIORARI

A.

This Case Is Not Proper For Review On Appeal

It has long been established that this Court is only vested with appellate jurisdiction over those federal questions raised and decided in the state court below. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969); *Crowell* v. *Randell,* 10 Peters 368, 392 (1836). It is, therefore, essential to the jurisdiction of this Court under 28 U.S.C. § 1257(2) "that there be an explicit and timely insistence in state courts that a state statute, as applied, is repugnant to the federal constitution, treaties or laws." *Charleston Federal Savings and Loan Ass'n* v. *Alderson,* 324 U.S. 182, 185 (1944). Thus, in order to draw a state statute into question, it is insufficient to challenge action under a statute as being unconstitutional generally; the statute itself must be specifically challenged as being unconstitutional. *Hanson* v. *Denckla,* 357 U.S. 235, 244 (1958); *Garrity* v. *New Jersey,* 385 U.S. 493, 495-96 (1967); *Ungar* v. *Sarafite,* 376 U.S. 575, 582-83 (1964); *Monks* v. *New Jersey,* 398 U.S. 71 (1970). "[A]n attack on lawless exercise of authority in a particular case is not an attack upon the con-

stitutionality of a statute conferring the authority. . . ." *Phillips* v. *United States,* 312 U.S. 246, 252 (1941). Appellants sole argument below was that the actions of the trial court in closing the trial were precluded by the United States Constitution. The Appellants have not, therefore, drawn Va. Code § 19.2-266 into question under 28 U.S.C. § 1257(2). *Kulko* v. *California Superior Court,* 436 U.S. 84, 90 n. 4 (1978).

On appeal to the Supreme Court of Virginia Appellants did not mention Va. Code § 19.2-266, much less challenge it as being unconstitutional under the First, Sixth and Fourteenth Amendments.[1] Appellants rest their contention that there is appellate jurisdiction not upon any specific challenge they made to Va. Code § 19.2-266, but solely upon the trial court's reference to its statutory authority to close the trial and upon citations to Va. Code § 19.2-266 in the Memorandum of Respondent (Appellees herein) in Opposition to Petitions for Writs of Mandamus and Prohibition and the Brief in Opposition to Petition for Appeal filed in the Supreme Court of Virginia.[2] The controlling issue in deciding this Court's appellate jurisdiction, however, is whether the Appellants challenged the constitutionality of the Virginia statute in the courts below. *See Kulko* v. *California Superior Court, supra.*

Contrary to the assertion of the Appellants, the Supreme Court of Virginia did not "obviously and necessarily decide the constitutionality of Va. Code § 19.2-266,, both on its face and as applied." (Brief of Appellants at 16). The Court may well have based its decisions upon the plenary authority of courts to protect an accused's right to a fair

[1] *See* Petition for Appeal and Memorandum in Support of Petitions for Writs of Mandamus and Prohibition filed by Appellants in the Supreme Court of Virginia. *Also see* A.4a-20a.

[2] *See* Brief of Appellants at 16.

trial without regard to Va. Code § 19.2-266. The Virginia statute clearly was not the focus of the appeal. There was no challenge in the Virginia courts to the validity of the statute sufficient to invoke this Court's appellate jurisdiction.[3]

Virginia law requires that constitutional challenges to state statutes be made in trial courts. *King* v. *Commonwealth,* 219 Va. 171, 174, 247 S.E.2d 368, 370 (1978). *Rice* v. *Commonwealth,* 212 Va. 778, 779, 188 S.E.2d 196 (1972). Since no such challenge was made in the trial court, the constitutionality of Va. Code § 19.2-266 was not and could not be considered by the Virginia Supreme Court. *King* v. *Commonwealth, supra; Mid-State Equipment Co. Inc.* v. *Bell,* 217 Va. 133, 225 S.E.2d 877 (1976); *Rice* v. *Commonwealth, supra.* The decisions of this Court require that appellate review be denied under such circumstances. *Beck* v. *Washington,* 369 U.S. 541 (1962). In *Beck,* the Court stated:

> "although both opinions of the [State] Supreme Court discuss the *interpretation* of [the State statute] neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute. The

[3] Plaintiff's reliance on *Jenkins* v. *Georgia,* 418 U.S. 153 (1974) is misplaced. In *Jenkins* the Georgia Supreme Court directly and unequivocally upheld as constitutional the statute sought to be drawn into question on appeal. Similarly in *Cissna* v. *Tennessee,* 246 U.S. 289 (1918) the Tennessee Supreme Court dealt directly with the constitutional issue subsequently raised in this Court. In *Braniff Airways, Inc.,* v. *Nebraska State Board,* 347 U.S. 590 (1954) the statute involved was also explicitly challenged as unconstitutional below. Though this Court allowed a due process challenge on appeal while the constitutional challenge below was under the Commerce Clause, the Court specifically found that the factual basis for the due process challenge was identical to the Commerce Clause challenge below and was within the clear intendment of the Commerce Clause attack on the statute.

> [State] Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in the trial court, even where the constitutional claims arise from the trial court's interpretation of the challenged statute. [Citation ommitted.] Petitioner's formal attack at the trial court level did not even mention [the State statute involved], much less argue that a restrictive interpretation would be unconstitutional under the Equal Protection Clause." *Id.* at 549-50. (Emphasis in original.)

As in *Beck* appellants herein did not challenge the constitutionality of Va. Code § 19.2-266 in the State trial court or the Virginia Supreme Court.[4]

Accordingly, the constitutional attack on Va. Code § 19.2-266 is not properly before this Court, and this appeal should be dismissed for want of jurisdiction.[5]

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[4] Appellants argue that it is not the rule in Virginia to require constitutional challenges to state statutes to be first brought before the trial courts. For this proposition Appellants rely on Virginia Supreme Court Rule 5:21 which provides that an objection not timely asserted below may, nevertheless, be considered "for good cause shown or to enable this court to attain the ends of justice." This exception has never been used and there is no indication that it was ever intended to allow a constitutional challenge to a state statute which was not raised at the trial level. None of the cases relied upon by appellants involved constitutional challenges to state statutes. *See* Brief of Appellants, p. 16, n. 10. Furthermore, though the specificity requirement for objections below may be waived, specificity remains essential to assignments of error on appeal. Rule 5:21. Appellant's failed to assign as error the trial court's arguable reliance on Va. Code § 19.2-266. This failure to "lay their finger on the error" is fatal to this appeal. *First National Bank of Richmond* v. *William R. Trigg, Co.*, 106 Va. 327, 342, 56 S.E. 158, 163 (1907); *Murphy* v. *Holiday Inns, Inc.*, 216 Va. 490, 219 S.E.2d 874 (1975).

[5] The Appellants alternatively argue that an appeal is proper even without a specific challenge to the statute contending that the decisions below create a statewide rule of court having the force of law in Virginia. This argument is completely devoid of merit. A rule of the Supreme Court of Virginia having general application may constitute a statute within the meaning of 28 U.S.C. § 1257(2). But *unreported* decisions of the Supreme Court denying petitions for appeal, mandamus, and prohibition in a single case are not legislative in character by any stretch of the imagination. There is no basis upon which to compare the actions of the Supreme Court of Virginia in adversary litigation to the legislative actions of State supreme courts in establishing rules for the integration of a state bar, amending statutory provisions governing criminal appeals, or promulgating rules for the administration of a state bar as Appellants would lead this court to believe. *See Lathrop* v. *Donohue*. 367 U.S. 820 (1961); *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971); *In re Griffiths*, 413 U.S. 717 (1973).

B.

Certiorari Should Not Be Granted In This Case

Appellants alternatively seek a writ of certiorari should the Court determine that there is an absence of appellate jurisdiction. Significantly, the Appellants relied in their Jurisdictional Statement exclusively upon this Court's appellate jurisdiction under 28 U.S.C. § 1257(2). Only now, after realizing their failure to properly establish appellate jurisdiction below, do they contend that there is an alternative basis for granting certiorari.

Though 28 U.S.C. § 2103 authorizes treatment of a jurisdictional statement as a petition for writ of certiorari, the requirement that this Court consider only federal questions passed upon by the state's highest court applies equally to petitions for certiorari. *Wilson* v. *Cook*, 327 U.S. 474 (1946). Underlying this requirement is the important principle of comity—the notion that "in the federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenges." *Cardinale* v. *Louisiana, supra,* at 439. The continuing importance of comity considerations cannot be denied. *Huffman* v. *Persue, Ltd.*, 420 U.S. 592 (1975); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977). Circumvention of this important principle in the instant case should not be

allowed. For these reasons, no writ of certiorari should be granted in this case to consider the constitutionality of Va. Code § 19.2-266.[6]

Other sound reasons exist supporting denial of certiorari in this case. The Appellants urge the Court to adopt admittedly new applications of the First and Sixth Amendments. They seek to establish a right to attend and observe criminal trials recognizing that no single provision of the Constitution expressly and unambiguously confers that right. (Brief of Appellants at 9). The Court is urged to establish this right because "our very survival as an open society requires no less." (Brief of Appellants at 13). In support of this broad claim Appellants refer to some eight instances in which courts have been asked to enter gag orders or closure orders since this Court's decision in *Gannett Co. Inc.* v. *DePasquale, supra.* (Brief of Appellants at 24, n. 21). Amici Curiae, *The Reporters Committee for Freedom of the Press, et al.,* ("Reporters" herein) in their appendix refer the Court to some limited data relating to closure orders entered since the announcement of this Court's opinion in *Gannett.* Such data, however, is of little value in assessing the effect of *Gannett,* if any, since similar data for comparable periods prior to the *Gannett* decision is not provided for comparison.[7]

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[6] Appellees contend that denial of certiorari is proper not only as to Appellants' challenges to Va. Code § 19.2-266 but also as to their constitutional challenges to the plenary authority of trial courts to close a trial to ensure the accused's right to a fair trial. The latter challenges were made below, but they were not saved in the questions presented in Appellant's Jurisdictional Statement. This failure prevents review of such constitutional questions. *See* Rules 15(c), 23(c) and 40(d)(2) of the Supreme Court of the United States, *Flournoy* v. *Wiener,* 321 U.S. 253, 263 (1944).

[7] Both Appellants and Amici Curiae argue that the data they have provided establishes the effects of this Court's decision in *Gannett.* Such trend analysis is obviously faulty because it is based upon a total lack of comparison data. Amici Curiae, Reporters, go so far as to say that "these initial closures are merely the hesitant beginning of an ever-increasing trend." (Brief of Amici Curiae, Reporters, at 12). Appellants characterize the data as showing that "*only recently* have any courts thought to exercise such grants of latent authority to cordon off entire criminal trials." (Brief of Appellants at 24). To the contrary, the first six cases mentioned by the Amici Curiae, Reporters, in their appendix indicate that closure motions had been used before this Court's decision in *Gannett.* To what extent the *Gannett* decision may have affected the practice of trial courts throughout the country is simply not shown by this insufficient data.

In the short time since *Gannett* was decided the vast majority of state legislatures have not been in session. Moreover, no other closure order by a trial court since *Gannett* has yet reached the appellate courts. *See* Appendix, Brief of Amici Curiae, Reporters. Thus, no accurate assessment of the effects of the decision in *Gannett* on trial closures is presented at this time.

Even if one assumes an increase in unwarranted closure orders in the wake of *Gannett,* the states may serve as effective laboratories in formulating a remedy which will protect the public's interest in open trials while not infringing on the accused's right to a fair trial. *Cf. New State Ice Co.* v. *Liebman,* 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting). This Court has often recognized the value of looking to the states for guidance when assessing the measure of constitutional restructuring necessary for effective administration of criminal justice.[8] Most dramatically this has been the approach of the Court in shaping the constitu-

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[8] *District of Columbia* v. *Clawans,* 300 U.S. 617 (1937) (determining what is a petty offense with respect to the right to trial by jury); *Wolf* v. *Colorado,* 338 U.S. 25 (1949) (determining that the exclusionary rule should not be applied to States); *Mapp* v. *Ohio,* 367 U.S. 643 (1961) (determining that exclusionary rule should apply to States) *Baldwin* v. *New York,* 399 U.S. 66 (1970) (determining what is a petty offense for jury trial purposes); *Scott* v. *Williams,* ... U.S. ..., 59 L.Ed.2d 383 (1979) (determining an indigent defendant's right to appointed counsel).

tional contours of the accused Sixth Amendment right to trial by jury. In *Duncan* v. *Louisiana,* 391 U.S. 145 (1967), the Court applied the Sixth Amendment guarantee of trial by jury to the states through the Fourteenth Amendment. In *Williams* v. *Florida,* 399 U.S. 78 (1970) the Court refused to hold unconstitutional laws of various states allowing juries of less than twelve persons. The Court noted that the holding in *Williams* did "no more than leave these considerations to Congress and the states, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." *Id.*, at 103.

Following similar reasoning in *Apodaca* v. *Oregon,* 406 U.S. 404 (1972) the Court found that the Constitution does not require jury verdicts to be unanimous. Of particular interest here is Mr. Justice Powell's concurrence in *Apodaca:*

> "In an age in which empirical study is increasingly relied upon as a foundation for decision-making, one of the more obvious merits of our federal system is the opportunity it affords each state, if its people so choose, to become a 'laboratory' and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists concerning the adequacy of our criminal justice system. The same diversity of local legislative responsiveness that marked the development of economic and social reforms in this county, if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with respect to determining—fairly and more expeditiously—the guilt or innocence of the accused." *Id.* at 376.

Most recently, in *Burch* v. *Louisiana,* 441 U.S. 130 (1979), which establishes the Constitutional requirement of unanimous verdicts by six member juries, the Court found the experience of the states instructive:

> "It appears that from those states that utilize six member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform *judgment of the nation* provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." [9] *Id.* at 104 n. 8. (Emphasis added.)

Thus, the present void of experience of the States in dealing with trial closure motions counsels strongly against granting certiorari for the purpose of fashioning new constitutional rules of access to criminal trials.[10]

The uncertain parameters and consequences of the novel

[9] Between the Court's decision in *Williams* and *Burch* it appears that ten states adopted provisions to allow for juries of six men in some criminal trials. And it was this trend of the States to decrease the size of the jury following *Williams* which the Supreme Court relied upon as its constitutional guide. *Compare Williams* v. *Florida, supra,* at 138 (Harlan, J., dissenting) (appendix) and *Burch* v. *Louisiana, supra,* at 138 n. 12.

[10] Appellees suggest *only* that the Court refrain from a decision at this time until the effects of *Gannett,* if any, are seen and other courts and the state legislatures have had an opportunity to react and the "judgment of the nation" is recorded. In this context it should be pointed out that before the appellants noted their instant appeal to this Court, the Virginia Attorney General's Office commenced drafting a proposed Virginia Public Trial Act to be introduced in the January 1980 session of the Virginia General Assembly, which proposals detail the procedures and standards for entry of a closure order at any stage of a criminal trial. These efforts were pursued at a time when a lawyer for the Appellants was quoted in a Norfolk, Virginia newspaper as stating that "the State Supreme Court's denial . . . was not unexpected in the wake of the *Gannett* decision" and that "[a]n appeal is not expected." *The Virginian-Pilot,* July 12, 1979, at A8, col. 6.

constitutional rights Appellants assert further suggests the wisdom of avoiding a rush to constitutional adjudication in this case. The questions that arise naturally from recognition of the asserted rights of the public to attend trials are unending. For example, if notice of requested closure is required this may well increase the publicity concerning the trial, the prejudice of which the accused is seeking protection by closure. Even if standing to object to closure is limited to those present at the time the closure motion is made, the extent and nature of the hearing necessary to protect this right fully is unclear. Must the court hear each individual spectator who objects? Must the court afford persons who object an opportunity to be represented by counsel? What evidence, if any, may objecting spectators present and who has the ultimate burden of proof? What appeal rights are available to persons whose objections to closure are not sustained?

If the public is severely limited in its ability to object, then perhaps a heavier burden is placed on the accused to sustain his initial motion to close a trial. Too great a burden upon an accused, especially indigent defendants, may well preclude most defendants from success in seeking closure, thereby increasing possibilities of prejudice to the accused's right to a fair trial and providing an additional basis for appeal.

If objecting spectators and members of the press are afforded a relatively liberal opportunity to state their objections with the assistance of counsel and the introduction of evidence, such an expanded hearing may well cause trial delays adversely affecting the accused's right to a speedy trial. Appeals from rulings on closure motions, if interlocutory, will only further magnify trial delay. Criminal defendants with limited resources may frequently find

themselves at a substantial disadvantage when a motion for closure is opposed by the resources of the institutional press.

Appellants seek recognition of a constitutional right of access to a public forum. Legislative attempts at establishing rights of public access such as the Federal Freedom of Information Act and the Virginia Freedom of Information Act, have not easily defined and adjusted public access rights. Both federal and state courts are deeply involved in continued re-definition of such statutory public access rights. Much legislative re-drafting has been necessary, and the administration of these rights continues to be a major effort.[11]

It is also difficult at this stage to forecast with any degree of certainty the standard which will be appropriate to determine when the risk to an accused's right to a fair trial is sufficient to overcome this newly declared right of access. The appellants suggest an "all-but-conclusive presumption" in favor of a public trial. The dissent in *Gannett* suggests

[11] Virginia's Freedom of Information Act came into being in 1968. Since then the legislature in reviewing its administration has amended it annually with the exception of 1969 and 1972. Some 20 bills have been enacted amending this Act and numerous others have been introduced but defeated. The Attorney General of Virginia has issued some 122 official opinions interpreting its provisions. Though there is no complete record of lower court decisions under the Act, the Supreme Court of Virginia has taken and decided two appeals involving its provisions. *See* Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (1950), as amended; Annual Report of the Attorney General, 1968-1969 through 1978-1979; *Archer* v. *Mayes,* 213 Va. 633, 194 S.E.2d 707 (1973); and *WTAR Radio-TV Corp.* v. *City Council,* 216 Va. 892, 223 S.E.2d 895 (1976). Such a history is indicative of not only the difficulty inherent in the establishment of rights of access but also the need for flexibility in their administration. The federal statute has given rise to similar problems. This Court has recognized that it is not an easy task to balance the opposing interests and provide a workable formula which encompasses, balances and protects all interests. *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, 261-262 (1975).

that the accused show a "substantial probability that irreparable damage to his fair trial will result." 99 S.Ct. at 2937. Mr. Justice Powell's concurring opinion in *Gannett* calls for the defendant "to make some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings." 99 S.Ct. at 2916. Without some experience with trial closure orders, a constitutional standard appropriate to all concerns cannot be meaningfully developed. For these reasons, this Court should not grant certiorari in this case.

II.

THE FIRST AMENDMENT DOES NOT AFFORD THE PUBLIC OR PRESS A RIGHT TO ATTEND CRIMINAL TRIALS

A.

The First Amendment Protects Dissemination Of Ideas And Information

The First Amendment has been viewed by this Court as a guarantee of freedom to discuss and publish ideas and information concerning public affairs and governmental operations. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978); *New York Times, Co.* v. *United States,* 403 U.S. 713 (1971); *Mills* v. *Alabama,* 384 U.S 124 (1966); *New York Times, Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Near* v. *Minnesota, ex. rel Olson,* 283 U.S. 697 (1931). The common thread of this Court's First Amendment decisions is the notion that freedom to *disseminate* ideas and information about public affairs is central to the purpose of the First Amendment.

First Amendment guarantees extend to dissemination of ideas and information concerning our courts and the administration of the judicial system. *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829 (1977); *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975); *Wood* v. *Georgia,* 370 U.S. 375 (1962); *Bridges* v. *California,* 314 U.S. 252 (1941).

These First Amendment rights to speak and publish concerning courtroom events, as in other contexts, are not absolute. Where utterances concerning court proceedings present a clear and present danger to the fair administration of justice such utterances may be punished. *Bridges* v. *California, supra; Wood* v. *Georgic, supra; see also Craig* v. *Harney,* 331 U.S. 367 (1947); *Pennekemp* v. *Florida,* 328 U.S. 331 (1946). Fair trial considerations impose upon our courts the constitutional duty to prevent bias against the criminally accused threatened by unrestrained press access to the courtroom. *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965). Thus, to the extent that courtroom access has been considered by this Court in prior decisions, access has never been viewed as a matter of constitutional right. Instead, access and the manner of reporting courtroom events has been perceived as an interest of the public and press subject to limitation by the paramount concern for the right of the accused to a fair trial. *Sheppard, Estes, supra.*

B.

The Appellants Do Not Assert Infringement Of Any Established First Amendment Right They Seek Establishment Of A New Right Of Access Which Has Never Been Recognized By This Court

This case does not call in question the established First Amendment rights to speak, publish or receive information. Instead, the Appellants urge the establishment of an

entirely new right of *access* to criminal trials. *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898, 2910-2912 (1979). This right of access is said to arise from the public need for the free flow of information about its governmental institutions as a necessary feature in a system of self-government. Brief of Appellant, 27-30.

1.

THE PUBLIC HAS NO EXISTING RIGHT OF ACCESS TO CRIMINAL TRIALS

The free flow of information concerning our courts of justice is undoubtedly a vital concern in our system of democratic self-government. Accordingly, the right of the public and press to freely discuss and publish information obtained concerning what transpires in our courts has been repeatedly safeguarded. *Bridges* v. *California; Landmark Communications, Inc.* v. *Virginia; Cox Broadcasting Corp.* v. *Cohn, supra.* But it is a wholly different proposition to suggest that the First Amendment guarantees access to all sources of information that may be beneficial to informed public opinion. First Amendment claims of access rights have been consistently rejected by this Court. *Houchins* v. *KQED, Inc.,* 438 U.S. 1 (1978); *Pell* v. *Procunier,* 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974); *Zemel* v. *Rusk,* 381 U.S. 1 (1965).

In *Zemel* the Court recognized the virtually limitless reaches of the First Amendment argument Appellants assert here, for "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." 381 U.S. 1, at 16-17. Thus, it was unequivocally held that "the right to speak and publish does not carry with it the unrestrained right to gather information." 381 U.S. 1, at 17. The Appellants' claim of a right

of the public to attend criminal trials under the First Amendment is similarly meritless. *Zemel, supra.*

2.

THE PRESS HAS NO FIRST AMENDMENT RIGHT OF ACCESS TO CRIMINAL TRIALS WHICH IS GREATER THAN THAT OF THE PUBLIC

The Appellants argue that even absent a public right of access to criminal trials, the press has such a First Amendment right, contending that the Constitution protects "news gathering." Relying upon dicta found in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), it is suggested that the First Amendment affords at least "some protection for seeking out the news," out of which arises the right of the press to attend criminal trials. But neither *Branzburg* nor any other decision of this Court implies any First Amendment right of the press to gain access to news sources. To the contrary, *Branzburg* held that the paramount societal interest in effective administration of justice required that news reporters appear before grand juries and reveal the identity of confidential news sources suspected of criminal activity notwithstanding the fact that such grand jury testimony may diminish future access to confidential news sources. Thus, *Branzburg* can hardly be relied upon for the proposition that the First Amendment guarantees press access to news sources. Mr. Justice Stewart, writing for the Court in *Pell* v. *Procunier, supra,* explained the extent of any First Amendment protection of news gathering stating:

> "It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. Branzburg v. Hayes, supra, and that government cannot restrain the publication of news ema-

> nating from such sources. Cf. New York Times Co. v. United States, supra. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court." 417 U.S. 817, at 834-835.

The First Amendment does not, therefore, guarantee the press a right of access to news sources. *Branzburg, Pell, supra.*

Recognition of a constitutional right of the press to gather news would necessarily require a definition of the term "press." The practical problems involved in applying such a right are at once evident. If, as appellants contend, this special right of the press emanates from its function of informing the public, would not the right to gather news belong only to the large institutional press? But recognition of a right of this nature is inconsistent with the historical context of the First Amendment which this Court has found was designed to protect the "lonely pamphleteer" as well as the large newspaper publisher. *Branzburg, supra,* at 704. Moreover, there is no requirement that the press publish information gained through this asserted right of access. *Houchins, supra,* at 14. The public's interest in self-government, therefore, is not necessarily advanced by recognition of such a special right of access for the press. There is, accordingly, no discernable basis for recognition of a constitutional right of access to news sources which the press asserts here. Indeed, the decisions of this Court have repeatedly rejected any suggestion that the First Amendment affords special rights to the press. *Branzburg, Pell, Saxbe, Houchins, supra.*

C.

The Fact That Criminal Trials Have Customarily Been Open To The Public And Press Does Not Establish A Constitutional Right Of Access

Our custom of public criminal trials is well-established. *In re Oliver,* 333 U.S. 257 (1948). But the explicit constitutional right of the accused under the Sixth Amendment to demand a public trial must account, in large part, for the custom of public trials. In any event, the fact that exclusion of the public and press from criminal trials is customarily rare does not establish for the benefit of the public and press a constitutional right to require public trials. *See Gannett, supra,* at 2910 n. 19.

The Appellants suggest that the traditionally public character of our courtrooms supports recognition of a First Amendment right of access. They contend that because courts are customarily viewed as public places there is greater reason for recognizing a First Amendment right of access to criminal trials than might obtain in situations where rights of access to places not usually public have been advanced. *Cf. Pell, Saxbe, Houchins.* But this Court's refusal to recognize a First Amendment right of access to places traditionally closed to public view in *Pell, Saxbe* and *Houchens,* suggests that there is even less reason to recognize a right of access to customarily public places. If, as the Appellants contend, the First Amendment right of access is premised upon the public's need for information concerning the operations of government, then a stronger case for public rights of access is made with respect to governmental operations in places where public access is customarily limited. Our tradition of public trials and the right of the accused to require a public trial are factors which militate against any need for recognition of a new constitutional right of access to criminal trials.

D.

The Function Of A Criminal Trial Does Not Imply A Right Of Public Access

Criminal trials "are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes* v. *Texas, supra,* at 540. The "atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." *Id.* The chief function of a criminal trial is, therefore, to fairly adjudicate the charges against the accused. It goes without saying that a fair trial is the paramount concern of the accused and is, indeed, his right. Society's interest in observing the trial process is to ensure that our criminal justice system does not become a means of governmental persecution. *In re Oliver, supra,* at 270. Thus, the main societal function and interest in criminal trials coincides with the interests of the accused. The accused does not, of course, have the unilateral right to require trial closure. *Singer* v. *United States,* 380 U.S. 24 (1965). Our adversary system of criminal justice is premised on the duty of the prosecutor and judge to represent the public's interest in criminal trials. *Berger* v. *United States,* 295 U.S. 78 (1935); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). But where the accused, prosecutor and judge all deem trial closure necessary to ensure a fair trial closure cannot be said to subvert the function of the criminal justice system or the interests of the public in the operations of that system.

Appellants apparently dismiss these premises which are the very foundations of our criminal justice system. They suggest that absent a constitutional right of the press and public to demand access to criminal trials closed trials may become the rule for the mere convenience of prosecutors

and judges. This argument ignores our historical experience and proves too much. If prosecutors and judges are deemed inherently incapable and unwilling to protect societal interest in the criminal justice system then our entire criminal justice system requires constitutional re-examination. *See* Part III, *infra* at pp. 36-37.

The Appellants maintain that only through recognition of a right of public access to criminal trials can the vital functions of a trial be accomplished. Their contention is that the vital function of a criminal trial is informational, providing a "social drama" through which the community at large can inform itself about and experience criminal justice. Appellant's Brief, 33-34. The public undoubtedly gains knowledge of the criminal justice system through observing its operation, but experience shows that the average citizen infrequently takes advantage of this informational opportunity. *Saxbe, supra* at 863 (Powell, J., dissenting). To the extent that criminal trials serve this informational function, our tradition of public trials in the vast majority of cases will continue to serve this societal need.

The fair adjudication of the accused, however, must remain the central focus and primary function of our criminal justice system. *Estes, supra,* at 540. The abstract right to know cannot be said to occupy the position of central importance when assessing the functions of the criminal justice system. The overriding importance of the constitutional guarantee of a fair trial, in some circumstances, has required limitations on public and press access to the courtroom. *Sheppard, supra,* at 358. Thus, the most vital and paramount function of the criminal trial in our society does

not require that the public have a First Amendment right of access to all criminal trials.[12]

III.

THE SIXTH AMENDMENT EMBODIES NO PUBLIC RIGHT OF ACCESS TO CRIMINAL TRIALS

In *Gannett Co. Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979), this Court stated that the Sixth Amendment's public trial guarantee does not give the public a right of access to criminal proceedings: "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Id.* at 2911.

A.

The Sixth Amendment Guarantee Of The Right To A Public Trial Is Personal To The Accused

1.

By Its Literal Terms The Sixth Amendment Secures The Right To A Public Trial Only To The Accused

In finding that the Constitution nowhere mentions any right of public access to a criminal trial, the *Gannett* majority stated that the constitutional guarantee of a public trial is "one created for the benefit of the defendant." *Id.* at 2905. In essence, the majority concluded that the Sixth Amendment means precisely what it says, that is that "the

[12] The Appellants suggest, for example, that closure forecloses the opportunity of the public to judge credibility of witnesses, noting that the availability of a post-trial transcript is unsatisfactory. (Brief of Appellant at 40-43). This presumes that the public's judgment of trial testimony is a vital function of a criminal proceeding. Obviously, only the trier of fact must judge the credibility of witnesses in order to ensure the proper function of a trial. Even appellate courts, which have an institutional function in the criminal justice system, do not have the advantage of live testimony.

accused shall enjoy" a right to public trial.[13] This literal reading is consistent with the over-all design of the Sixth Amendment, which has as its overriding purpose the protection of the accused from judicial and prosecutorial abuses. *Id.* at 2905-06. This conception of the public trial guarantee finds consistent support in the decisions of this Court and various lower federal and state courts.[14] It also finds support in numerous commentaries.[15]

2.

Existence Of A Common Law Rule Of Open Civil And Criminal Proceedings Does Not Establish A Sixth Amendment Right In The Public To Attend A Criminal Trial

While a majority of this Court in *Gannett* recognized the existence of a common law tradition of open civil and criminal proceedings, they found no evidence that the framers of the Sixth Amendment intended to create a constitutional right of access in the public. 99 S.Ct. at 2908. Thus, the court refused to ascribe constitutional dimension

[13] The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. Const., Amendment VI.

[14] *See, e.g., Estes* v. *Texas,* 381 U.S. 532, 538-39, 583 (1965); *In Re Oliver,* 333 U.S. 257, 270 (1948); *Patton* v. *United States,* 281 U.S. 276, 298 (1930); *United States* v. *Geise,* 265 F.2d 659, 660 (9th Cir. 1959) (per curiam); *United States* v. *Sorrentino,* 175 F.2d 721, 722-23 (3rd Cir. 1949); *United Press Ass'n* v. *Valenti,* 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954). Only one court is known to have held that the Sixth and Fourteenth Amendments confer upon members of the public a right of access to a criminal trial. *United States* v. *Cianfrani,* 573 F.2d 835 (3rd Cir. 1978). That holding, however, has been criticized for its departure from the plain meaning of the Sixth Amendment. *See, Gannett, supra,* at 2906 n. 9.

[15] *See* commentaries summarized in *Gannett,* 99 S.Ct. at 2906 n. 9; Douglas, *The Public Trial and the Free Press,* 33 Rocky Mt. L. Rev. 1, 5 (1960).

to the common law tradition. Indeed, the majority notes that in "conspicuous contrast with some of the early state constitutions that provided for a public right to open civil and criminal trials, the Sixth Amendment confers the right to a public trial only upon a defendant and only in a criminal case." *Id.* at 2908-09. The refusal to raise custom and tradition to the level constitutional mandate is entirely consistent with the fact that historically very few common law rules have been elevated to the status of constitutional rights. *Id.* at 2908.

Had the framers intended to elevate and embody within the Constitution the common law tradition of open proceedings, it is not logical to assume that the only reference to a public trial would be found in the Sixth Amendment, which by its terms speaks only of the accused in a criminal case. Moreover, were this Court to ignore the clear text and structure of the Constitution to find within the Sixth Amendment a public right of access to criminal trials, innumerable unanswered questions would arise concerning the scope of such a right within the trial process. *See* I, *infra*, pp. 18-21.

B.

The Right To A Fair Trial Must Not Be Denied

1.

THE ACCUSED'S RIGHT TO A FAIR TRIAL IS PARAMOUNT TO ANY SOCIETAL INTEREST IN A PUBLIC TRIAL

In any criminal proceeding, the ultimate concern is for protection of the accused's right to a fair trial.[16] This Court has referred to this right as "unquestionably one of the most

[16] In *The Right To A Fair Trial*, Mr. Justice Powell, then President of the American Bar Association, recognized this concern, noting that:

> [W]e must avoid being confused by generalizations and slogans . . . some persons have talked about "a public right to know" as if it were a constitutional right. These generalizations miss the point. . . . We must bear in mind that the primary purpose of a public trial and of the media's right as a part of the public to attend and report what occurs there is to protect the accused. . . . The ultimate public concern is not the satisfaction of curiousity or an abstract "right to know." Rather it is the assurance that trials are in fact fair and according to law.

Powell, *The Right To A Fair Trial*, 51 ABAJ 534, 538 (1965).

precious and sacred safeguards enshrined in the Bill of Rights," *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 572 (1976) (Brennan, J., concurring), and in fact has characterized it as "the most fundamental of all freedoms." *Estes* v. *Texas*, 381 U.S. 532, 540 (1965). Although the press should normally be allowed the opportunity to observe judicial proceedings, "its exercise must be subject to the maintenance of *absolute fairness* in the judicial process." *Id.* at 539 (emphasis added). "[T]he life or liberty of any individual in this land should not be put in jeopardy because of the actions of any news media. . . ." *Id.* at 540. Accordingly, "the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged." *Sheppard* v. *Maxwell*, 384 U.S. 333, 358 (1966). Indeed, this Court has made clear that "our system of law has always endeavored to prevent even the probability of unfairness." *In Re Murchison*, 349 U.S. 133, 136 (1955).

Appellees fully realize, as did the majority in *Gannett*, that there is a strong societal interest in public trials and in the vast majority of cases, trials have in fact been open. As noted, however, the societal interest in public trials must yield whenever necessary to maintain "absolute fairness." To ensure such fairness, this Court placed an affirmative obligation on trial judges to protect the rights of the ac-

cused. *Sheppard* v. *Maxwell, supra.*[17] In fulfilling this obligation, a trial judge must exercise broad discretion, which should not be disturbed absent a clear showing of abuse. *See Nebraska Press Ass'n* v. *Stuart, supra,* at 563. *Cf. Ehrlichman* v. *Sirica,* 419 U.S. 1310 (1974). Indeed, this Court recognized in *Gannett* that "our criminal justice system permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial." 99 S.Ct. at 2905 n. 6. Moreover, it was stated that "a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." *Id.* at 2904. It would be the height of irony if the public was permitted to use the accused's constitutional right to a public trial, his personal "safeguard against any attempt to employ our courts as instruments of persecution,"[18] to nullify his constitutional guarantee of a fair trial.[19] As one court concluded in rejecting a media claim for a right of access to criminal trials, "petitioners are seeking to convert what is essentially

[17] Specifically, the Court stated:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure the balance is never weighed against the accused. 384 U.S. at 362.

[18] *In Re Oliver,* 333 U.S. 257, 270 (1948).

[19] Appellees submit that in this case the Virginia trial judge exercised his discretion to close the trial in good faith, out of legitimate concern that an open proceeding would infringe the defendant's right to fair trial. Judge Taylor interrupted the trial, however, to allow counsel for Appellants to present written and oral arguments to the court challenging the closure order. (App. 7a-20a). Judge Taylor concluded that an open proceeding would infringe the defendant's right to a fair trial and he was of the view that "where the rights of the defendant are infringed in any way . . . [and] he makes the motion . . . and . . . it doesn't completely override the rights of everyone else, then I'm inclined to go along with the defendant's motion." (App. 17a). Accordingly, Judge Taylor adhered to his closure order. (App. 21a).

the right of a particular accused into a privilege for every citizen, a privilege which the latter may invoke independently of, and even in hostility to, the rights of the accused. A moment's reflection is enough . . . to demonstrate that that cannot be. . . ." *United Press Ass'n* v. *Valente,* 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954).

2.

RECOGNITION OF A SOCIETAL INTEREST IN PUBLIC TRIALS CREATES NO CONSTITUTIONAL RIGHT ON THE PART OF THE PUBLIC AND SOCIETY'S INTEREST IS FULLY PROTECTED BY THE PARTICIPANTS

The public, which includes the press, has important interests in the trial of a person charged with a crime, not the least of which is the interest of securing for an accused a fair trial. *See In Re Oliver,* 333 U.S. 257 (1948). In *Gannett,* however, this Court found that any recognition of an independent public interest in the enforcement of Sixth Amendment guarantees was a "far cry . . . from the creation of a constitutional right on the part of the public." 99 S.Ct. at 2907. After concluding that interest alone does not create a constitutional right, the Court found that there was no basis for inferring a Sixth Amendment right on the part of the public to attend criminal trials, since "[i]n an adversary system of criminal justice, the public interest . . . is protected by the participants in the litigation." *Id.* Like the public interest in speedy trials and trial by jury, any independent public interest in public proceedings is adequately protected by the parties and the trial judge. *Id.* Where a defendant waives his right to a jury trial, and the prosecutor and the judge consent, for example, "it could hardly be seriously argued that a member of the public could demand a jury trial because of the societal interest

in that mode of fact-finding."[20] *Id.* Nor can it be seriously argued that a member of the general public has any "right to prevent a continuance in order to vindicate the public interest in the efficient administration of justice." *Id.* at 2908. In short, "[t]he public's interest is adequately safeguarded as long as the accused himself is given the opportunity to assert on his own behalf, in an available judicial forum, his right to a trial that is fair and public." *United Press Ass'n* v. *Valente, supra* at 81, 123 N.E.2d at 781.[21]

Appellants argue, however, that the public's interest is not adequately protected by the participants in the litiga-

[20] Inasmuch as the public trial clause is personal to the accused, with the overriding purpose of protecting the accused's right to a fair trial, the public lacks sufficient standing to challenge a trial closure. Any media interest is of a general nature shared by the public at large. Such an interest provides an inadequate personal stake in the outcome of the controversy for Art. III purposes. A sufficiently concrete interest in the outcome of a suit is necessary, however, to qualify as a case or controversy subject to a federal court's Art. III jurisdiction. *See Singleton* v. *Wulff,* 428 U.S. 106, 112 (1976). Moreover, to satisfy this Court's prudential standing limitations, parties must be "proper proponents of the particular legal rights" on which they base their challenge, *id.*, that is they must be within the "zone of interests intended to be protected by the constitutional . . . provision" on which they rely. *Id.* at 123 n. 2. (Powell, J., joined by Burger, Stewart and Rehnquist, JJ., concurring in part and dissenting in part.) The Sixth Amendment, however, secures the right to a public trial only to the accused and members of the public therefore are not proper proponents of this right. This is especially true where, as here, the trial closing was requested by the accused and consented to by the prosecution.

[21] By the very nature of things, the accused's defense is more than likely to be adequate. As the court in *Valente* further stated:

> Whatever concern the public may have for a defendant's right to a fair trial, it can seldom match that of the person whose life or liberty is at stake. . . . As long as the defendant is assured the right to invoke the guarantees provided for his protection, the public interest is safe and secure, and there is neither need nor reason for outsiders to interject themselves into the conduct of the trial.

308 N.Y. at 81, 123 N.E.2d at 781.

tion. They speculate, for example, that occasional closed hearings may foster corrupt bargains among prosecutors, judges and defendants. Outside of an absolute ban on private proceedings, however, no procedure could entirely foreclose that possibility. Appellants' argument calls into question the integrity of the entire judicial process, which is seldom, if ever, conducted completely in public. Rules of procedure governing countless routine trials were not designed or intended to entirely foreclose the possibility of a judicial mistake.[22] The workability of our system depends on the assumption that competent honest persons will occupy the positions of judge and prosecutor. Indeed, this Court has recognized that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . . ." *Berger* v. *United States,* 295 U.S. 78, 88 (1935). "This responsibility of the prosecutor . . surely encompasses a duty to protect the societal interest in an open trial," *Gannett, supra,* at 2908 n. 12. In fact, most of the interests preserved by open trials are concurrent with the interest of the prosecutor or the defendant and can be asserted by them. Both have a stake in the quality of testimony, the discovery of unknown witnesses, and the conscientious performance of official duties by trial participants. In the hypothetical case, where the defendant, prosecutor and judge conspire to subvert the public interest, it is doubtful that public observation would provide much safeguard, since such a conspiracy would in all likelihood be consummated in private discussions, even if the formal proceedings were public.

Finally, the contentions that public trials restrain perjury

[22] *See* Mr. Justice Stevens, Address at the University of Arizona College of Law Dedication Ceremony, September 8, 1979.

and are needed to bring forward new witnesses "seem anachronistic," particularly in the modern publicity case, "when many facts of the prosecution are widely broadcast regardless of whether the hearing is open or closed. Taken together, the arguments seem more the stuff of appealing courtroom drama than substantial principles of modern law."[23] Similar observations have been made with respect to other public interests purportedly advanced by open trials.[24]

3.

ANY GENERAL PUBLIC INTEREST IN LIMITING THE USE OF TRIAL CLOSURES CAN BE PROTECTED BY THE POLITICAL PROCESS

A trial judge has the inherent power and the obligation to close or restrict public access to the courtroom to protect the rights of the parties and witnesses and generally to further the fair administration of justice. *See Gannett, supra* at 2910 n. 19; *Sheppard* v. *Maxwell, supra* at 358. To be sure, closure orders should be sparingly employed and should not be granted routinely or simply because the accused so moves. While in many instances less restrictive measures may be employed, at times closure will be the

[23] *See* Madsen, S., *The Right To Attend Criminal Hearings,* 78 Columbia L. Rev. 1308, 1323 n. 118 (1978).

[24] For example, the contention that public scrutiny improves the performance of trial participants is weak. "Such scrutiny, when intense, may actually impair performance by inducing a debilitating self-consciousness." *Id.* 78 Columbia L. Rev. at 1323 n. 118. Moreover, one commentator has noted that the presence of a crowd in the courtroom has been more often a stimulus to improper judicial conduct than a check upon it. *See* Radin, *The Right To A Public Trial,* 6 Temp. L. Q. 381, 394 (1932). Finally, this was the fourth trial of Stevenson and there is nothing to suggest that any of the interests preserved by open trials were jeopardized by closure of this trial.

only effective remedy to protect constitutional rights of a criminal defendant or the public interest in the fair and orderly disposition of criminal proceedings. In many cases, "[c]ontinuance, extensive voir dire examinations, limiting instructions or venue changes may prove paltry protection for precious rights" and "[r]eversals and new trials are hardly acceptable alternatives." *Gannett Co., Inc.* v. *DePasquale,* 43 N.Y.2d 370, 380, 372 N.E.2d 544, 550 (1977).[25] Each case must be determined on the basis of its unique facts and circumstances. The considered opinion of the court, the prosecutor and defense counsel that closure is necessary should not lightly be disregarded. *Cf. Singer* v. *United States,* 380 U.S. 24, 34-35 (1965). Having imposed upon the trial judge the affirmative obligation to protect the rights of the accused,[26] it would surely be inconsistent to withhold the discretionary power necessary to accomplish the task.

It is possible, of course, for some judges to abuse their discretion and occasionally enter unwarranted closure orders. While this may be an important consideration for state legislatures to weigh in establishing and revising state law and policy, it is not an acceptable justification for creation of new constitutional rights.

[25] Specifically, continuance has been found in some instances to work against speedy trial values. *See Groppi* v. *Wisconsin,* 400 U.S. 505, 510 (1971). Moreover, extensive voir dire can prove costly, time-consuming and ultimately futile. *See Irvin* v. *Dowd,* 366 U.S. 717, 726-29 (1961). In addition, change of venue may prove useless if the new location has been saturated with adverse publicity. *See Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 545 (1976); Madsen, S., *The Right to Attend Criminal Hearings,* 78 Colum. L. Rev. 1308, 1329 n. 152. Finally, instructions and sequestration may be of limited value in offsetting the effects of prejudicial publicity.

[26] *Sheppard* v. *Maxwell, supra* at 352-63; *Irvin* v. *Dowd,* 366 U.S. 717 (1961).

IV.

THE FIRST AND SIXTH AMENDMENTS, WHEN TAKEN IN CONJUNCTION, DO NOT SUPPORT A PUBLIC RIGHT OF ACCESS TO CRIMINAL TRIALS

Neither the First nor the Sixth Amendment alone provides a basis for a public right of access to criminal trials.[27] Nor do these Amendments taken together support such a right.

Admittedly this Court has found that in special circumstances separate constitutional rights may converge to establish a new right not specifically enumerated. In most such instances, however, the previously recognized converging rights have significantly reinforced each other, have promoted related purposes, and have conferred their benefits upon the same person or persons. Moreover, the newly established right was, in these cases, found necessary to achieve the core purposes of the existing rights.

In *Boyd* v. *United States,* 116 U.S. 616 (1886), for example, the Fourth and Fifth Amendments were found to converge and reinforce each other to protect an individual's security and privacy against a statute authorizing compulsory production of personal records for use as evidence against the individual. The Court had recognized that neither amendment on its own was sufficient to invalidate the statute.

Similarly, in *NAACP* v. *Alabama,* 357 U.S. 449 (1958), this Court found a right of association in the "close nexus between the freedoms of speech and assembly," protected by separate clauses of the First Amendment. *Id.* at 460. Recognition of this right of association was found to clearly promote the fundamental purposes of each clause, while a failure to recognize the activity as protected would have

[27] *See* Parts II and III *supra.*

frustrated those purposes. Similar analysis has been applied in other cases.[28]

In sharp contrast to the above-mentioned cases, the Sixth Amendment right of a public trial is personal to the accused and is designed to guarantee the accused a fair trial. The concern of the First Amendment, however, is the right of the press and public to disseminate information, which in many instances may conflict with rather than reinforce the purpose of the Sixth Amendment. Where such conflict occurs, the First and Sixth Amendment rights can hardly be said to be interdependent. Because of the potential conflict between these two Amendments and given their divergent core purposes, there is no basis for finding any public right of access from the separate existence of the Amendments.[29]

V.

THE COURT BELOW GAVE ALL APPROPRIATE DEFERENCE TO ANY CONSTITUTIONAL RIGHT OF ACCESS IN ITS DECISION TO CLOSE THE TRIAL

Assuming, *arguendo,* that there is a constitutional right of access to criminal trials which runs to the public and the press, the trial court, in the instant case, gave all appropriate

[28] *See e.g., Griswald* v. *Connecticut,* 381 U.S. 479 (1965); *United States* v. *United States District Court,* 407 U.S. 297, 313-14 (1972).

[29] Similarly, there is no merit to Appellant's argument that a right of access is implicit in the Anglo-American regime of ordered liberty and is among the rights or privileges "retained by the people." (*See* Appellant's Brief at IID). In support of this argument, Appellant simply reargues his notion that common practice and tradition establish a right of access as a fundamental right. This argument, however, has been rejected in *Gannett.* 99 S.Ct. at 2907-09. Moreover, the tradition of open trials is in large part explained by the explicit right of an accused to a public trial in a criminal case. Accordingly, this tradition should not be the basis for creation of new rights which may be hostile to the rights of the accused to a fair trial.

deference to any right of access in its decision to close the trial. The closure motion of defense counsel was based upon prior difficulties in controlling a spectator who had apparently transmitted information to witnesses. Upon motion by the accused and without objection from the Commonwealth's Attorney or from any spectator, including Appellants, the trial court ordered that the trial be closed to the public and press. (App. at 5a-6a). Despite the Appellants' failure to object at the time of closure, they were granted a hearing after the first day of the trial at which they presented written and oral argument challenging closure. (App. at 7a-20a). The trial court assumed that the public and the press had a protected constitutional interest but reasoned that there must be a balancing of that interest against the defendant's right to a fair trial (App. at 12a-13a), an "evaluation" which counsel for appellants agreed was appropriate. (App. at 13a). The trial court ruled that "where the rights of the defendant are infringed in any way . . . [and] he makes the motion. . . and it doesn't completely override the rights of everyone else, then I am inclined to go along with the defendant's motion." (App. at 17a). Accordingly, the closure order was continued.

This Court approved similar procedural steps in *Gannett* v. *DePasquale, supra,* at 2912. Though Appellants urge that more stringent procedures are required, they further maintain that the ruling of the trial court was defective because there was "virtually nothing to support" closure. (Brief of Appellant at 69). The record, however, discloses several important factors which weighed in favor of protecting the right of the accused to a fair trial through closure. Appellants, on the other hand, offered no evidence to support the viability of reopening the trial.

As indicated previously, the closure motion was first

premised upon a prior trial of the same defendant in which there was difficulty involving conversations between witnesses and a spectator.[30] The trial court was also aware and reminded that one of the previous mistrials was caused by a prospective juror who related prejudicial newspaper accounts to other jurors. The record further indicates that the venire was a small community where jurors would be more likely to be aware of and affected by any hostility towards the defendant within the community evidenced within the courtroom. The trial court also took note of the layout of its facilities. Although this factor may have little importance in the average case, this was not the average case in the Circuit Court of Hanover County. A previous guilty verdict had been overturned and two previous attempts at retrial had ended in mistrials.[31] Thus, avoidance of a third mistrial was a legitimate concern and enhanced

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[30] The record upon appeal does not articulate with precision every factor which the trial court may have considered in ordering the closure of the trial. However, this Court must recognize that the closure motion was made on the fourth attempt to try this defendant and that the judge, prosecutor and defense counsel were fully aware of the difficulties and problems which had arisen in the prior proceedings, as were appellants. (App. at 24a-39a). Though appellants characterize the references in the record as being "nebulous and unsupported" (Brief of Appellants at 67), the obvious explanation is that such references were more than clear to the parties to the prior proceedings and required no further detail. That they are clearer to Appellants than they admit is apparent from the record in this appeal which is amplified by appellants own news articles. (App. 29a, 34a, 35a, and 37a).

[31] The Court's reference to the layout of the courtroom evidenced more than a desire to prevent the jury from seeing the spectators. Though all of the Court's concerns may not have been articulated, appellants courtroom sketch, Exhibit A, shows that whenever the jury goes to the jury room they must necessarily pass through the spectator gallery. Furthermore, because the doorways to the jury room lead to the gallery and the public arcade, it is to be expected that even the inadvertant comments of spectators, let alone those calculated to prejudice the accused, would be heard by the jurors.

the need to assure that prior difficulties would not be repeated. *Estes; Sheppard, supra.* Appellants offered no contradictory evidence supporting an open proceeding but suggested that alternatives to closure of the trial would adequately protect the defendant's right to a fair trial. Sequestering the jury and change of venue, the only alternatives specifically mentioned, were not viable under the circumstances. Sequestration was, at the time of the hearing on closure, moot because the jury had been dismissed for the day. A change of venue was no longer viable either since the trial was already under way. Moreover, the problems the Court had experienced and which motivated closure involved the in-court intimidation of the jury.

Under the "all-but-conclusive" presumption which the appellants seek to have established, it is doubtful that the accussed in this case or any case, for that matter, would be able to meet the burden of proof necessary for closure.[32] Such a constitutional straitjacket should not be foisted upon the criminal justice systems of the states without clear proof of the need for it and the effects it will have.[33]

CONCLUSION

This nation's longstanding tradition of public criminal trials is not historical accident. It is the product of the well-established constitutional rights of the accused and

[32] Admittedly, at the expense of the accused's right to a fair trial, this presumption would avoid "the costly case-by-case task of judging future closure orders." (Brief of Appellants at 61). The value of this cost-saving device is itself constitutionally suspect in view of the potential prejudice to an accused right to a fair trial.

[33] *See* Argument I, B, above. Unlike legislation which may be readily changed and which allows for effective experimentation, a constitutionally based rule is destined to be long-termed and inflexible.

responsible protection of public interests by those entrusted with the administration of criminal justice.

Foremost among our aims has been the right of the accused to a fair trial—the most basic of all freedoms. The assurance of a fair trial must continue to occupy this central place in our scheme of justice, for otherwise there is little need for the system itself. Adherence to these tried and proven principles will not, as the Appellants suggest, usher in an era of secret criminal trials.

The new constitutional rights urged in this case do not arise out of experience which reveals their necessity. The consequence of their establishment poses a myriad of imponderables that may seriously threaten the central purpose of criminal trials. It would be the ultimate irony, indeed misfortunate, if in our well-intentioned efforts to add new constitutional dimension to our proven system we threaten its most vital function.

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CERTIFICATE OF SERVICE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one counsel for the Appellees in the above-captioned matter, hereby certify that three (3) copies of this brief have been served upon counsel for all parties required to be served by depositing the same in the United States Post Office with first class postage prepaid this 9th day of January, 1980.

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FOR ARGUMENT

Supreme Court, U.S.
FILED
FEB 13 1980
MICHAEL RODAK, JR., CLERK

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Appellants,

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Appellee.

(And Two Companion Cases)

On Appeal from the Supreme Court of the Commonwealth of Virginia

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REPLY BRIEF OF APPELLANTS

INTRODUCTION

Pursuant to Rule 41.3 of the Rules of this Court, appellants Richmond Newspapers, Inc., *et al.,* file this brief in reply to the Brief On Behalf Of The Appellees Commonwealth of Virginia, *et al.,* filed with this Court on January 9, 1980. This reply brief is being filed more than three days before the case is called for hearing.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE MATTER IN CONTROVERSY BOTH BY APPEAL AND BY CERTIORARI.

Appellants seek review of the Virginia Supreme Court's judgments on appeal, 28 U.S.C. § 1257(2), because the closure order entered below was no mere lawless act but a quite literal application of a state statute which invites the state's trial courts, "in [their] discretion, [to] exclude from . . . trial" any and ail observers, however orderly, on the theory that their "presence would impair the conduct of a fair trial." Va. Code § 19.2-266. Since the trial court and the state relied solely upon that statute to support the expulsion of all observers from the courtroom in this case,[1] the judgments below necessarily upheld that statute over appellants' First, Sixth, and Fourteenth Amendment challenges. The failure of appellants specifically to repeat appellees' mention of Va. Code §19.2-266 manifestly did not deprive the court below of the opportunity to consider the statute's validity in light of appellants' constitutional attack. Neither the decisions of this Court[2] nor those of the Supreme Court of Virginia[3] warrant a demand for further formality as an

[1] Appellees suggest in their brief before this Court that the courts below "may well have based [their] decisions upon the plenary authority of courts to protect an accused's right to a fair trial without regard to Va. Code § 19.2-266." Brief On Behalf Of The Appellees at 10-11. But that suggestion was never advanced below. And the suggestion would in any event have been insupportable, since the record in this case reveals absolutely no threat to fairness and no finding of such a threat. Finally, the suggestion would have been altogether incoherent, inasmuch as Va. Code §19.2-266 *by its own terms* makes "fair trial" the supposed justification for excluding persons from a courtroom throughout a criminal case. The question presented by appellants' attack upon that statute is the validity of stretching the "fair trial" talisman that far.

[2] *See* Brief of Appellants at 14-20.

[3] *See id.* at 16 n.10.

end in itself where, as here, the validity of Va. Code § 19.2-266 was so plainly "drawn in question . . . on the ground of its being repugnant to the Constitution," and the "decision [was] in favor of its validity." 28 U.S.C. § 1257(2).[4]

But even if an appeal does not lie, the propriety of review on certiorari, 28 U.S.C. §§ 1257(3), 2103, is beyond debate. *See* Brief of Appellants at 21-23. Conceding that appellants' First, Sixth, and Fourteenth Amendment "challenges to the plenary authority of trial courts to close a trial . . . . were made below," Brief On Behalf Of The Appellees at 14 n.6, appellees suggest only that such challenges were not "saved," *id.*, in the questions presented in appellants' Jurisdictional Statement. But that Jurisdictional Statement expressly challenged the constitutionality of Va. Code § 19.2-266 not only as written and construed but "as enforced" on this record, J.S. at 6, 21-26. Appellants stressed that, although the Virginia statute was drawn in question, "the questions posed would not be materially different were closure ordered pursuant to purely judge-made rules." *Id.* at 13 n.11.

Appellees' only other objection to review on certiorari depends upon the supposedly "novel" character of the rights appellants assert. Brief On Behalf Of The Appellees at 17-20. That objection is groundless.

[4] In exercising its mandatory appellate jurisdiction not only (1) to review decisions in which the judgment below made no mention of the statute at issue, but also (2) to review decisions in which appellants below made no mention of the statute at issue, as well as (3) to review decisions in which neither the judgment nor appellants below made any mention of the statute at issue, *see* Brief of Appellants at 18-19, this Court has demonstrated that the *form* in which a state statute is challenged as repugnant to the Federal Constitution or is sustained against such a challenge is not the test of this Court's exercise of such jurisdiction. Section 1257(2) thus calls "not for some abracadabra." Flournoy v. Wiener, 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting). *See also* New York ex rel Bryant v. Zimmerman, 278 U.S. 63 (1928).

II. THE RIGHT TO ATTEND AND OBSERVE CRIMINAL TRIALS CANNOT BE LEFT TO THE VAGARIES OF THE POLITICAL PROCESS.

Appellees seek to portray the rights asserted here as both novel and troublesome and thus inappropriate for anything beyond political cognizance and enforcement. *Id.* at 17-18, 22, 24, 30, 37, 39, 43. On the contrary, it is appellees' conception of the constitutional plan that problematically departs from tradition.

Appellees' reading of the Sixth Amendment is far narrower than this Court's—for every Member of this Court agreed in *Gannet Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979), that there is "an independent public interest in the enforcement of [the] Sixth Amendment" guarantee of a public trial. *Id.* at 2907; *id.* at 2913 (Burger, C.J., concurring); *id.* at 2914 (Powell, J., concurring); *id.* at 2930-33 (Blackmun, J., concurring in part and dissenting in part). And the proposition that excluded members of the public have standing to enforce such an interest under this Court's settled criteria, *see* Brief of Appellants at 45-46, remains unrefuted.[5] Nor have appellees addressed any of the reasons offered by appellants for concluding that the First, Ninth, and Fourteenth Amendments, in conjunction with the Sixth, have long secured a right to attend and observe criminal trials. *Id.* at 27-43, 51-59.

[5] Even if appellees were right in their assertion that the Sixth Amendment's public trial clause protects only persons accused of crime, it would be indisputable that the clause protects such persons not merely by giving each an option to insist upon publicity but also assuring all who stand accused of crime that the *system* in which they will be prosecuted and judged will be open to the routine public observation that alone can expose, and thus deter, patterns of bias or oppression—patterns which a system that could be closed by consent of its participants would be likely to breed. *See* Brief of Appellants at 56-57.

Appellees suggest, without so much as adverting to appellants' contrary arguments, *id.* at 47-49, that the political processes of the several states may be relied on to provide adequate protection for the fundamental right here at stake. Brief On Behalf Of The Appellees at 19-20, 36-39. But the appellees' own claim that the criminal trial in this very case was properly closed to the press and the public, *id.* at 39-42, speaks eloquently to the hollowness of that political suggestion. The laboratories of the fifty states, *see New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1931)(Brandeis, J., joined by Stone, J., dissenting), ill-serve the Constitution when their processes are invoked to shroud with secrecy the most public of all proceedings. Whatever risks other nations might be willing to run, an open society's commitment to open trials cannot be regarded as merely another tentative experiment.

"[F]ree access to courts of justice," *Downes* v. *Bidwell*, 182 U.S. 244, 282-83(1901), is by no means a newly asserted right; it is, instead, among the "natural rights .... indispensable to a free government ...." *Id.* And appellants' insistence that this right be made secure rests upon no mere statistical sampling of some supposed contrary trend. *See* Brief On Behalf Of The Appellees at 14-15 & n.7. Whether the Nation's courts have deferred some trial closings out of disagreement with the Virginia Supreme Court or out of a desire to await this Court's decision in the instant case, the Constitution's measure cannot be taken on any such precarious scale. For we deal here not with innovative regulation in the social or economic arena, or in still-uncharted provinces of criminal administration, *cf. Apodaca* v. *Oregon*, 406 U.S. 404, 376 (1972)(Powell, J., concurring), but with a state's misguided invocation of a decision

of this Court to tamper with a tradition that is centuries old—a tradition that is demonstrably central to the public awareness and institutional accountability that define our form of government.

Respectfully submitted,

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Feb. 13, 1980

Supreme Court, U. S.
FILED
NOV 28 1979
MICHAEL RODAK, JR., CLERK

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Summary 2a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY,
Appellants,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,
Appellants,

v.

RICHMOND H. C. TAYLOR,
Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,
Appellants,

v.

RICHMOND H. C. TAYLOR,
Appellee.

On Appeal from the Supreme Court of the Commonwealth of Virginia

BRIEF FOR *AMICUS CURIAE*, STATE OF NEW JERSEY

Statement of the Matter Involved

In the case now before this Court, a trial judge has, without any justification, ordered that a criminal trial be held in secret. Both the media and the public were absolutely barred from attending any portion of the guilt determination phase of the criminal proceeding. The First Amendment right of the media to gather information and to disseminate it to the public was totally thwarted far beyond the effect of any prior restraint. Moreover, the Sixth Amendment right of the public to have access to criminal trials was completely ignored. Secret judicial criminal proceedings, especially involving the guilt determinative process, are totally repugnant to the concept of open government and cannot be tolerated. The State of New Jersey appears in the role of *amicus curiae* to urge this Court to hold that the media and the public have a presumptive right to attend and to report on criminal trials.

Appellants in this matter, Richmond Newspapers, Inc. and two of its reporters, Timothy B. Wheeler, and Kevin McCarthy, challenged a closure order issued by a State trial court excluding all members of the media and public from the entirety of a two-day murder trial held on September 11 and 12, 1978 in Hanover County, Virginia. At the start of trial on September 11, the attorney for defendant John Paul Stevenson moved to have the press and public excluded from the courtroom for the duration of the criminal proceeding. The prosecutor did not object, noting that such a motion was in the discretion of the Court. The trial judge, relying on *Va. Code* sec. 19.2-266, ordered that the courtroom be kept clear of all parties except the witnesses when they testify (Pa8). The Court made no finding that such action was necessary to protect defendant's rights to a fair trial and never considered

whether any alternative measures could have been employed to protect the defendant's rights.

Appellants were afforded a hearing on their motion to vacate the court's closure order. Advancing no reason, the court ordered the reporters out of the courtroom and heard counsel *in camera*. Counsel for appellants argued that the action of the court violated the First, Sixth and Fourteenth Amendments by not first determining that a fair trial would be jeopardized by the presence of the public and that no other alternative measures could adequately protect defendant's rights (Pa11-14). Defense counsel asserted that given the fact that this was a small community, no other methods could protect the defendant's right to a fair and impartial trial (Pa15).

After hearing these arguments the trial court refused to reopen the proceeding opining that the presence of people in the courtroom is distracting to the jury and noting that this was defendant's fourth trial on these charges.[1]

Appellants filed a notice of appeal to the Virginia Supreme Court on September 28, 1978. On November 8, 1978 appellants filed a petition for appeal, a petition for mandamus to enjoin the trial judge from denying them access to any future proceeding and a writ of prohibition for the same purposes. The Virginia Supreme Court, ap-

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[1] Defendant's first conviction was reversed and remanded for a new trial because of the admission of inadmissible evidence. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S.E. 2d 779 (1977). His second trial in October of 1978 ended in a mistrial when a juror asked to be excused after trial commenced and no alternate was available. (Pb9 n. 6). The third trial also ended in a mistrial, evidently because a prospective juror had read about Stevenson's trial and told other prospective jurors about the case before the start of the trial. *Id.*

parently relying exclusively on this Court's decision in *Gannett* v. *DePasquale,* —— U.S. ——, 99 S.Ct. 2898 (1979), denied the petition for appeal and dismissed the petition for writs of mandamus and prohibition on July 9, 1979 (PaA, B and C).

Appellants filed a timely Notice of Appeal from those judgments to this Court on August 13, 1979, invoking jurisdiction under 28 U.S.C. sec. 1257(2) (Pa14). On October 9, 1979, this Court granted review of this matter and postponed consideration of jurisdiction. Because of the fundamental public importance of the questions presented by their appeal, and the impact of these issues upon this State, the State of New Jersey appears as *amicus curiae.*[2]

Question Presented

Do the First, Sixth, and Fourteenth Amendments as interperted by this Court's holding in *Gannett* v. *DePasquale,* —— U.S. ——, 99 S.Ct. 2688 (1979), permit a trial judge to exclude the media and the public from the entire trial of a criminal defendant.

[2] The interest of the State of New Jersey in this matter is not insignificant since the New Jersey Constitution contains provisions virtually identical to the First and Sixth Amendments to the United States Constitution. See *N.J. Const.*, Art. I, sec. 6 and Art. I, sec. 10.

POINT I

The First, Sixth and Fourteenth Amendments mandate a holding that *Gannett* v. *DePasquale* does not authorize the total exclusion of the media and public from the entire trial of a criminal defendant.

A. The need for clarification and limitation of *Gannett* v. *DePasquale.*

This case presents issues of vital public importance which have, in part, been spawned by this Court's decision in *Gannett Co. Inc.* v. *DePasquale,* —— U.S. ——, 99 S.Ct. 2898 (1979). Succinctly stated, the question is whether and under what circumstances a trial court, consistent with constitutional considerations, may order the wholesale exclusion of the media and the public from the entire trial of a criminal defendant. It is the position of the State of New Jersey that, absent extraordinary circumstances, criminal trials may not be closed without offending the constitutional guarantees embodied in both the First and Sixth Amendments.

Gannett held that the Sixth Amendment's public trial guarantee does not give the press or the public a right of access to a pretrial suppression hearing that was closed by the trial court with the agreement of both the prosecution and the defense. Writing for a splintered five man majority, Mr. Justice Stewart expressed the view that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee . . . is personal to the accused . . . we hold that members of the public have no constitutional right . . . to attend criminal trials." 99 S.Ct. at 2905. The majority reserved on the First Amendment issue.

In our view, despite the broad language found in the majority opinion, *Gannett* must be limited to the precise confines of the question there presented. Thus, this Court only held that the public and the press may be excluded from pretrial proceedings without offending the Sixth Amendment. *Id.* at 2913. (Burger C.J. concurring). Nevertheless, while it appears that the decision only affects certain proceedings, it has been construed to permit the closure of actual trials. Indeed, even a member of this Court has construed *Gannett* in this fashion. Thus, the observation of Mr. Justice Rehnquist in his *Gannett* concurrence remains an actual and worrisome possibility: that if, as this Court held, the public has no constitutional right to attend a criminal trial, "it necessarily follows that if the parties agree on a closed proceeding, the trial court is not required by the Sixth Amendment to advance any reason whatsoever for declining to open a pretrial hearing or trial to the public." *Id.* at 2918 (Rehnquist, J., concurring). Justice Rehnquist's assessment has already been the subject of much controversy. Since *Gannett* there have been a number of cases in which trials were closed to the press and to the public premised on a liberal reading of this Court's opinion therein.[3]

As a result of *Gannett,* in rare instances the existence of compelling and extraordinary reasons may result in a court ordering the closing of certain pretrial hearings. While New Jersey will not concede the desirability of such a practice, this drastic alternative has been held by this Court not to offend the Constitution. Yet, excluding all members of the press and public from the courtroom

[3] See Survey of the National Reporters Committee for the Freedom of the Press (Aa1-4). In fact, in one case the trial judge excluded the press but allowed members of the public to remain. *State v. Woomer,* No. 79-65-26-203 (S.C. Cir. Ct. 1979).

during an actual trial is a far different matter and, we submit is constitutionally suspect. Once the preliminary evidential issues have been resolved and the actual guilt determinative process begun, there is, we submit, no apparent possibility of prejudice to the accused in making public that which is simultaneously disclosed to the ultimate trier of fact. The public's right to know demands no less a standard.

The closure order entered in this case is abhorrent to the tradition of open trials which is deeply rooted in American history and common law. Although the majority in *Gannett* failed to ascribe constitutional validity to this tradition in the context of pretrial proceedings, we submit that the public trial concept embodied in the First and Sixth Amendments ensures against the type of order here in issue. Apart from its constitutional underpinning, the tradition of open trials is grounded in strong policy reasons closely associated with the criminal justice system itself. Thus, the four justices who dissented in *Gannett* aptly observed that the Sixth Amendment right of the public to scrutinize public trials guards against prosecutorial, judicial and police abuse; informs the public about a criminal justice system that may protect or menace them; monitors the performance of individuals within the system and instills public confidence in judicial remedies, processes and deliberations. 99 S.Ct. at 2940.

The strong policy reasons for opening trials to the public are also related to many of the same concerns which underlie the First Amendment. From the standpoint of the press, the *in camera* procedure, while not a direct restraint, arguably achieves the same result by more subtle means and becomes in effect a prior restraint on its newsgathering ability. Indeed, Justice Powell conceded that the ruling in *Gannett* "denies access" to an im-

portant source of information, namely the courtroom, if judge and litigants agree to close it. *Id.* at 2915. While this Court has, on a previous occasion, recognized the media's right to publish what has transpired during a public hearing, *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976), this right in our view will have little meaning if the ability to gather information in the first instance is frustrated by providing for the ability to completely close such proceedings.

The instant matter thus affords an opportunity for this Court to clarify its opinion in *Gannett* and to provide urgently needed guidance for trial courts throughout the country. Without further clarification from this Court, *Gannett* will be repeatedly misapplied depriving the public, and the media, as the representatives of the public, of their presumptive right to observe the conduct of criminal proceedings.

B. Access to criminal trials by the media and the public is a fundamental constitutional right.

The constitutional right of the public and the press, as representatives of the public, to attend criminal trials derives from the First, Sixth and Fourteenth Amendments, and is deeply ingrained in our history. Each of these constitutional provisions reflects our belief that secret judicial proceedings are anathema to a free society. *In re Oliver,* 333 U.S. 257 (1948). This Court in referring to criminal trials has repeatedly emphasized the importance of open proceedings to ensure their fairness. See *e.g. Shepard* v. *Maxwell,* 384 U.S. 333, 359 (1966); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975). Unquestionably, "the public has the right to be informed as to what occurs in its courts." *Estes* v. *Texas,* 381 U.S. 532,

541 (1965). See also *Craig* v. *Harney,* 331 U.S. 367, 374 (1947). The presence of the public at trial is the judicial institution's most potent force supporting the impartial administration of justice. It is not without significance that the people are a party in *all* criminal proceedings; they unquestionably have a right of access to information regarding those proceedings. See 49 A.L.R. 3d 1007, 1013 (1972); Comment, 47 *Univ. Cin. L. Rev.* 444, 462 (1978); Note, "The Gag Order, Exclusion and the Press's Right to Information," 39 Alb.L.Rev. 317, 322 (1975). The public is an integral part of every trial, not only as represented by the jury, and the prosecutor, but through its own presence.

The origins of the public trial and its basis in the Sixth Amendment as applied to the States through the Fourteenth Amendment has been ably and thoroughly chronicled by Justice Blackmun in his concurring and dissenting opinion in *Gannett* and will not be repeated here at length. 99 S.Ct. at 2919-2941. 3 *Blackstone, Commentaries* 372 (1968); 1 B. Schwartz, *The Bill of Rights: A Documentary History* 129, 140, 271 (1971). As noted by Justice Blackmun, the Sixth Amendment embodies an unbroken history of open trials designed not only to protect the defendant by preserving the integrity and impartiality of the trial process but also to serve society as a whole by enabling it to scrutinize the performance of those involved within the criminal justice system. 99 S.Ct. at 2927-2933. Furthermore, there is no basis in constitutional law for finding any "right to a private proceeding or a power to compel a private proceeding arising out of the ability to waive the grant of a public one," and this Court has persistently refused to find such a right. 99 S.Ct. at 2907, n. 11 and 2930. See also *Singer* v. *United States,* 380 U.S. 24, 35 (1965) (dictum).

The First and Fourteenth Amendment basis for public access to criminal trials has also been enunciated in a number of opinions by this Court. See *e.g., Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976); *Gannett Co. Inc.* v. *DePasquale, supra,* 99 S.Ct. at 2914 (Powell, J. concurring). The First Amendment basis for this right of access is so crucial to the matter before this Court that it must be explored in greater detail.

Unquestionably, a public trial involves a societal interest that is distinct from that of the parties involved. A courtroom is not only an institution in which public and private disputes are peacefully resolved, it also functions as a public forum for the purpose of allowing the public to be informed of the operations of the judicial system. Note, "Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings," 91 Harv.L.Rev. 1899, 1901 (1978); Comment, 47 Univ.Cin.L.Rev. 444, 460 (1978). Thus, it is vital that the public have access to information regarding the operation of the criminal justice system.

It has long been recognized that the core objective of the First Amendment is the preservation of a full and free flow of information to the general public. *Houchins* v. *KQED, Inc.,* —— U.S. ——, 98 S.Ct. 2588, 2605 (1978) (Stevens J. dissenting); *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 761-765 (1976); *Garrison* v. *Louisiana,* 379 U.S. 64, 77 (1974). This Court has held that the First Amendment protects not only the dissemination but also the receipt of information and ideas.[4] Thus, the First Amendment right of access to ju-

[4] See *e.g., Virginia Pharmacy Board* v. *Virginia Consumer Council, supra* at 756; *Procunier* v. *Martinez,* 416 U.S. 396, 408-409 (1974); *Kleindist* v. *Mandel,* 408 U.S. 753, 762-763 (1972); *Red Lion Broadcasting, Inc.* v. *F.C.C.,* 395 U.S. 367, 396-97 (1969). See generally, L. Tribe, *American Constitutional Law,* sec. 12-19 (1978); Note, "The Constitutional Right to Know," 4 *Hastings Const. L. Q.* 109 (1977); Note, "The Rights of the Public and Press to Gather Information," 87 *Harv.L.Rev.* 1505, 1506-10 (1974).

dicial proceedings is based upon the protection of the free flow of information. This Court has explicitly recognized the need to ensure access to newsworthy information:

> Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. [*Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972)]

See also *Pell* v. *Procunier,* 417 U.S. 817, 833 (1974).

Obviously not all interested members of the public can physically attend every criminal trial. Instead, the public at large heavily relies upon the members of the press, as their representatives, to report on the workings of the criminal justice system. A newsman on assignment acquires news "not . . . [only] for his own edification" but also to serve the needs of society. *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 17 (1978) (Stewart J., concurring). This function of the press has long been recognized and protected by this Court.

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. [*Shepard* v. *Maxwell,* 384 U.S. 333 (1966)].

In short, the most effective tool for assuring the public's right to observe trials is through the presence of representatives of the media. Thus, to limit or exclude the press is, in effect, to limit the public's right to be in-

formed. As noted earlier, in order to fully protect the ability of the press to disseminate vital information, some protection of its ability to gather news is indispensable. *Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972). See also *Pell* v. *Procunier,* 417 U.S. 817, 833 (1974).

In the cases dealing with prior restraints on publication, this Court has vigorously stressed that such restraints seriously infringe upon First Amendment rights. See *e.g., Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976). A prior restraint operates as an immediate and irreversible sanction, it "freezes" speech at least for a period of time. 427 U.S. at 559. Although closure orders and gag orders differ in form, both operate to deny information to the public regarding the operation of the judicial system and to deny the press the right to publish. See Comment, 47 *Geo. Wash. L. Rev.* 319, 335 (1978). Thus, the closure of courtrooms undercuts First Amendment freedoms by affording the courts a mechanism for avoiding the heavy presumption against prior restraints while accomplishing the same effect.

Given the diverse opinions expressed by this Court in *Gannett,* amicus recognizes the difficulty in identifying a constitutional right of public access to criminal trials as exclusively falling under either the First or Sixth Amendment. While either amendment, as noted previously, could be viewed as forming a basis for such a right, this Court should find that a right of access emanates from a reading of both the First and Sixth Amendments in conjunction with the Ninth Amendment and applying them through the Fourteenth Amendment.[5] Using the penumbra analysis

[5] Such an approach has been suggested by at least two commentators. See A. Howard and S. Newman, A Background Report on Fair Trial and Free Expression Prepared for the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th cong., 2d Sess. 26-27 (1976); Note, "The Right to a Public Trial in Criminal Cases," 41 *N.Y.U.L.Rev.* 1138, 1156-57 (1966).

of *Griswold* v. *Connecticut,* 381 U.S. 479, 492 (1965),[6] this approach places a right of free access within the penumbras of the rights of freedom of speech and press and the right of a public trial in order to fully protect the exercise of those rights.

As this Court has recognized, the "specific guarantees in the Bill of Rights have penumbras, formed by emanations of those guarantees that help give them life and substance." *Griswold* v. *Connecticut, supra,* 381 U.S. at 484. Thus, for example, the rights of freedom of speech and press have been interpreted to include not only the right to utter or to print, but also the right to distribute, the right to receive information, the right to read, and freedom of inquiry, freedom of thought and freedom to teach. *Griswold* v. *Connecticut, supra,* at 482 and cases cited therein.[7] These peripheral rights, not specifically mentioned in the Constitution were found to exist because without them the specific rights would be less secure. *Griswold* v. *Connecticut, supra* at 482-483.

Support for this expansive reading of the First and Sixth Amendments may be found in the Ninth Amendment. This Court has noted that the Ninth Amendment

[6] In *Griswold,* this Court found a right of marital privacy emanating from penumbras of the First, Third, Fourth, Fifth and Ninth Amendments.

[7] See also, *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 756 (1976); *Procunier* v. *Martinez,* 416 U.S. 396, 408-409 (1974); *Kleindist* v. *Mandel,* 408 U.S. 753, 762-763 (1972); *Red Lion Broadcasting, Inc.* v. *F.C.C.,* 395 U.S. 367, 396-97 (1969). See generally, L. Tribe, *American Constitutional Law,* sec. 12-19 (1978); Note, "The Constitutional Right to Know," 4 *Hastings Const. L. Q.* 109 (1977); Note, "The Rights of the Public and Press to Gather Information," 87 *Harv.L.Rev.* 1505, 1506-10 (1974).

reflects the belief of the framers of the Constitution that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. *Griswold* v. *Connecticut, supra* at 484, 381 U.S. at 488-494 (Goldberg, J. concurring).

With respect to the constitutional status of the right in question, amicus would urge that public access to criminal trials is necessary to properly secure and protect the values and rights of public trial and freedom of speech and press provided by the Sixth and First Amendments. It is respectfully submitted that without a right of access to criminal trials, the public's rights to receive and disseminate information will be severely limited by virtue of the shutting off of the flow of information regarding an integral part of our society.

Moreover, as noted in both the majority opinion and in Justice Blackmun's dissenting opinion in *Gannett,* criminal trials have historically been open to the public in order to ensure not only a fair trial for the defendant, but also to ensure an informed citizenry which is essential to the functioning of any democracy. *Gannett* v. *DePasquale, supra,* 99 S.Ct. at 2906-2907; 99 S.Ct. at 2922-2932. The widespread recognition of societal interests in conducting open judicial proceedings and the long historical tradition of open trials both here and in England suggest that public access to criminal trials is one of the fundamental rights retained by the people even though not specifically enumerated by the Constitution. Whatever its precise textual source, the existence of a constitutional right of the members of the media and the public to attend criminal trials cannot be doubted.

The record in the case now before this Court is utterly devoid of any evidence that the presence of the public, and

the press as the representatives of the public, would in any way have harmed the defendant.[8] Even if such evidence did exist it is virtually impossible to imagine any circumstances in which the exclusion of the press and the public from the entire criminal trial could be tolerated. The situation in a jury trial, which is indisputably a public event, is far different from that of a pretrial proceeding. Given the wide variety of alternative methods of preserving a defendant's right to a fair trial, such as sequestration of the jury, side bar conference, and forceful instructions, it requires the most fertile imagination to conjure a situation where complete exclusion of the press and public would be tolerable.

Even assuming, while not conceding, that such circumstances might occur, such a drastic limitation on the public's right of access could only be ordered pursuant to clear need and accompanying specific criteria. It could not occur, as it did in this case, at the unbridled discretion of the trial court. See *Cox* v. *Louisiana,* 379 U.S. 536, 557-558 (1965). Complete closure of a public trial, should it occur, would only be upon a showing that there is a clear and present danger to the fairness of the trial and that such drastic action is strictly and inescapably necessary to protect the defendant's fair trial guarantee in that all other reasonable alternative means would be ineffective. *Gannett* v. *DePasquale,* 99 S. Ct. at 2940 (Blackmun, J. concurring in part and dissenting in part). See also American Bar Association, Standards Relating

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[8] The fact that the particular trial involved in this appeal has ended in no way moots this appeal. The order closing a criminal trial is too short in its duration to permit full review and the circumstances are clearly capable of repetition. *Gannett* v. *DePasquale,* 99 S.Ct. at 2904. See also *Nebraska Press Ass'n.* v. *Stuart,* 427 U.S. at 547 (1976).

to the Administration of Criminal Justice, Fair Trial and Free Press, sec. 8-32 at 16 (Approved Draft 1978). In the instant matter, the trial court made no effort to "determine whether there [were] alternative means available by which the fairness of the trial might be preserved without interfering substantially with the public's interest in a prompt access to information concerning the administration of justice." 99 S.Ct. at 2916 (Powell, J., concurring).

Amicus submits that the closure in this case on the basis of *Va. Code* sec. 89.2-266, indicates that the Virginia court sanctioned the concept of secret trials, a practice which is plainly unconstitutional and abhorrent to our system of public administration of justice. From the standpoint of both the press and the public, the closure of trials is nothing more than a prior restraint on the newsgathering ability of the press and plainly unconstitutional. See *Branzburg* v. *Hayes,* 408 U.S. at 707. *Cf. Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976).

C. The public's right to a fair and just trial may outweigh its right to access in extraordinary cases.

Amicus has previously demonstrated that *Gannett* cannot be construed as permitting the exclusion of the media and the public from an entire criminal trial. The First and Sixth Amendments require no less. However, we have also recognized that upon a showing by the defendant of a clear and present danger to the fairness of the trial, closure may be temporarily ordered. Such drastic action may be taken only when it is shown to be inescapably necessary to protect the defendant's right to a fair trial and no other alternative means are available. The inquiry does not end here, however. The necessity for

closure of portions of criminal trials has been recognized in situations other than those threatening the defendant's right to a fair trial. On rare occasions certain proceedings have been temporarily and partially closed in order to ensure a fair trial and to preserve the integrity of the criminal justice system. Such instances most frequently occur as a necessary means of eliciting truthful and accurate testimony which will in turn result in judgments or verdicts which enhance the integrity of the judicial system. In short, closure of proceedings in such instances may occur only when the public's right to access is outweighed by the public's right to an orderly and just system of criminal justice.

Like other constitutionally protected guarantees, the right of public access to trials is not absolute. There are a number of competing interests that may conflict with the right of public access thus requiring a balancing and reconciliation of the countervailing concerns. In certain situations, however, there has never been any doubt about shielding criminal proceedings from public view. Thus, our criminal justice system has as integral components secret grand and petit jury deliberations. In such instances, the absolute necessity for closure is evident. Any other result would subvert the truthfinding functions of the grand and petit juries and result in miscarriages of justice. The Constitution was not drafted to encompass such proceedings within the First and Sixth Amendment rights of public access.

Where the conflict is not susceptible to such an easy and broad balancing, there must be a weighing, in each instance, of the derivative benefit in effectuating the opposing interest and the incidental burden imposed thereby on the public's right of access. Relatively minor gains in the former should not justify major impairments of

the latter. For reasons previously mentioned, all appropriate deference should be given to the presumption of openness. When in irremediable conflict, the countervailing interest should take precedence only when insistence on unlimited public access would seriously and imminently threaten the orderly administration of justice, including the government's interest in obtaining a fair conviction, and there is no less restrictive way to achieve the same end. In this event, the means chosen must be directly related to the end sought and must extend no further than the circumstances strictly warrant.

In the past, courts on both the state and federal levels have identified four general but distinct competing interests other than fair trial which may, depending on the circumstances, justify overriding unlimited public access: protection of witnesses, privacy, decorum and preservation of state secrets.[9] The concern voiced is that full public exposure and the concomitant publicity may jeopardize any one of these legitimate and important opposing interests and thereby endanger the integrity of the criminal process. For instance, it may appear that hold-

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[9] It has long been recognized that the right of public access is not absolute and that the trial court has the inherent power under exceptional circumstances and in the interests of an orderly administration of justice, to regulate admission into the courtroom and to temporarily bar the public, even when it is the accused who objects to the exclusion of the public or a portion thereof. See, *e.g., United States* v. *Nixon,* 418 U.S. 683 (1974); *Dennis* v. *United States,* 384 U.S. 855 (1966); *Palermo* v. *United States,* 360 U.S. 343 (1959); *Roviaro* v. *United States,* 353 U.S. 53 (1957); *United States* v. *Arroyo-Angulo,* 580 F.2d 1137 (2 Cir. 1978), *cert.* den. —— U.S. ——, 99 S.Ct. 285 (1978); *Stamicarbon, N.V.* v. *American Cyanamid,* 506 F.2d 532, 542 (2 Cir. 1974); *United States* v. *Bell,* 464 F.2d 667 (2 Cir. 1972), *cert.* den. 409 U.S. 991 (1972); *Kleinbart* v. *United States,* 388 A.2d 878, 882 (D.C.App. 1978).

ing certain portions of the trial in the open will inhibit a witness from speaking frankly in public, or jeopardize the safety and wellbeing of a prosecution informant, or threaten the ability of the government to preserve sensitive state secrets relevant to issues contested in the trial. There may also be a need to exclude unruly spectators, limit the number of spectators or place restrictions on the access of the electronic media to ensure that the testimony is easily heard and that the jury and witnesses are not distracted.

The conditions and circumstances under which closures have occurred are well documented and, as noted, generally involve preservation of order and decorum,[10] protection of witnesses from harassment or injury[11] or severe emotional distress,[12] protection of defendant's ability to testify,[13] preservation of the confidentiality of certain in-

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[10] *Estes* v. *Texas,* 381 U.S. 532 (1965); *United States ex rel. Orlando* v. *Foy,* 350 F.2d 967 (2 Cir. 1965), *cer.* den. 384 U.S. 1008 (1966).

[11] *United States ex rel. Smallwood* v. *LaValle,* 377 F.Supp. 1142 (E.A.N.Y. 1974), aff'd 508 F.2d 837 (2 Cir. 1974), *cert.* den. 421 U.S. 920 (1975); *United States ex rel. Bruno* v. *Herald,* 408 F.2d 125 (2 Cir. 1969), *cert.* den. 397 U.S. 957 (1970); *People* v. *Hagan,* 24 N.Y.2d 395, 248 N.Y.2d 588 (Ct.App. 1979).

[12] *United States ex rel. Latimore* v. *Sielaff,* 561 F.2d 691 (7 Cir. 1977), *cert.* den. 434 U.S. 1076 (1978); *Greise* v. *United States,* 252 F.2d 151 (9 Cir. 1958), *cert.* den. 361 U.S. 842 (1954); *United States* v. *Kobli,* 172 F.2d 919 (1949); *Commonwealth* v. *Wright,* —— Pa. Super. ——, 388 A.2d 878 (Pa.Super. 1978); *Commonwealth* v. *Stevens,* 237 Pa.Super. 457, 352 A.2d 504 (Pa. 1975); *State* v. *Purvis,* 157 Conn. 198, 251 A.2d 178 (Conn. 1965), *cert.* den. 395 U.S. 928 (1969).

[13] *Shepard* v. *Maxwell,* 384 U.S. 333 (1966); *Kirstowsky* v. *Superior Court,* 143 Cal.App. 745, 300 P.2d 163 (Dist.Ct. 1956).

formation[14] or the identity of undercover agents.[15] Such decisions illustrate that courts have been willing in extraordinary cases to permit limited exceptions to the principle of openness where necessary to protect some other interest. We submit however that the public interest in maintaining open courts requires that any exception to the rule be narrowly drawn. If closure is allowed it should only be because the collision of competing interests in any given case will most probably give rise to a recurring conflict in which insistence on unrestricted public access would mean that the government would be unable to obtain convictions in a whole class of cases. Stated somewhat differently, if refusing to allow closure will result in a pattern of repeated dismissals against the government and pose a recurrent threat to conviction for some genre of cases, then such a concern should take precedence over the public right of access to trials. The governmental interest at stake is not convicting a particular defendant but rather preventing the wholesale immunization of certain types of criminals from prosecution and ensuring the orderly administration of justice.

Most obvious are those classes of cases characterized by the use of juvenile witnesses or victims of sexual offenses. The justification for closure, when requested, in rape cases lies not solely in the peculiar circumstances of the particular witness, but more importantly in generalized notions of personal dignity.[16] Mere embarrass-

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[14] *Stamicarbon, N.V.* v. *American Cyanamid, supra,* 506 F.2d at 539-40; *United States* v. *Lopez,* 328 F.Supp. 1077 (E.D.N.Y. 1971).

[15] *United States ex rel. Lloyd* v. *Vincent,* 520 F.2d 1272 (2 Cir. 1975); *People* v. *Hinton,* 31 N.Y.2d 71, 286 N.E. 2d 265 (Ct.App. 1972).

[16] *United States ex rel. Latimore* v. *Sielaff, supra,* 561 F.2d 691, 694.

ment of witnesses with no showing that this difficulty represents a recurring problem, should not override the public's right of access to trials. Where, however, the choice is between public access and the public interest in fair convictions under the law, the latter should prevail. Were it otherwise, the fair and orderly administration of justice would be seriously and imminently impeded.

Once the countervailing interest has been identified, there must be every attempt to accommodate it by means least restrictive to public access. Inevitably, however, there will be situations in which no less drastic measure than exclusion is available to facilitate the orderly administration of justice. In the case of presenting sensitive testimony or details of a highly revolting nature, especially, it may be that the conflicting interests can never be accommodated. The reluctance of the witness, after all, stems from the very presence of the public. Similarly, there is inherent difficulty in reconciling the need of the government to present certain confidential evidence in secret with the right of the public to observe the proceedings. When, in such cases, the opposing interests stand in irremediable conflict, narrowly drawn restrictions on public access ought to be allowed.

A different situation is presented in the area of publicity during an ongoing trial. There is a substantial likelihood here of accommodating public access with the orderly administration of justice. A trial court has a number of available options to deal with the problem. The *Gannett* dissent listed eight such devices: (1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) *voir dire,* (6) peremptory challenges, (7) sequestration and (8) admonition of the jury.[17] As the dissenters noted:

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[17] See also, *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 563-564 (1976); *Shepard* v. *Maxwell,* 384 U.S. 333, 354 n. 9, 358-362 (1966).

"One or more of these alternatives may adequately protect the accused's interests and relieve the court of any need to close the proceeding in advance."[18]

Finally, while exclusion of the public in order to further the administration of justice may be proper, the exclusion may be for no longer and of no greater scope than that necessary to serve the legitimate countervailing interest. Closure orders, if proper, must extend no farther than the circumstances strictly warrant and apply only to portions of the proceeding strictly and inescapably necessary to protect the interests advanced by the defendant or the government.[19] For example, if closure is requested and deemed appropriate in a rape case, it must be limited to that period of time during which the reluctant complainant testifies. In the case of prejudicial publicity, "it might well be possible to exclude the public from only those portions of the proceeding at which the prejudicial information would be disclosed, while admitting to other portions where the information the accused seeks to suppress would not be revealed."[20] During the actual trial this may entail excluding the public whenever the jury is excused as when legal argument on the admissibility of certain evidence is made outside the presence of the jurors. Once evidence has been screened for its admissibility and reliability, however, there would be no justification on this ground for barring the public during its presentation to the jury, no matter how fatally prejudicial.

Unlike the wholesale closure of an entire criminal trial which occurred in this instance, narrowly drawn restric-

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[18] *Gannett* v. *DePasquale, supra.*

[19] *Cf. United States* v. *Cianfrani,* 573 F.2d 835, 845 (3 Cir. 1978).

[20] *Id.* at 854, cited in *Gannett* v. *DePasquale, supra.*

tions as to time and scope may be unavoidably necessary for the trial itself to proceed to a fair and just result and more generally, to ensure an efficient and continuous process of criminal justice. The resultant gains to the system when compared to the relatively minor interruption on access rights occasioned by brief and temporary closures, no doubt provide ample justification for their use.

Whatever the circumstances under which an exclusionary order may be appropriate, its application on the facts of this case is particularly distressing. The order in issue, calling for wholesale exclusion during an entire criminal trial, was issued without benefit of any showing that open proceedings would threaten any significant interest. Even assuming that the right to a fair trial was in some way implicated, there was no indication that this interest presented a recurring concern as opposed to being merely peculiar to the particular circumstances of that trial.[21] In any event, no demonstration was made that the interest allegedly implicated stood in irremediable conflict with the right of public access and certainly no effort was undertaken at accommodation. In this respect, the trial court made no attempt to determine if alternative measures less drastic than complete closure could have effectively protected the right to a fair trial. Without analysis of alternative measures, a procedure which at least indirectly infringes on First Amendment freedoms is unconstitutional. Moreover, the order, unqualified by time or scope limitations, was unresponsive to the countervailing interests at

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[21] The only consideration adduced by the court in favor of closing the trial was that given the courtroom's "layout", "having people in the Courtroom is distracting to the jury." Since the physical dimensions of the courtroom apparently had posed no problems in the past concerning public access and the accused's right to a fair trial, we could only assume the absence of a recurrent conflict.

play. In extending much farther than the circumstances and conditions could possibly demand, the challenged closure suffered from unconstitutional overbreadth.

In sum, the trial court in this case engaged in no balancing whatsoever of the competing interests involved. The court failed to make the minimal factual inquiry required even for a temporary closure. This total disregard of the constitutionally protected rights of the press and the public to trial access mandates reversal.

CONCLUSION

Amicus respectfully submits that the actions of the trial court in this matter are an unconstitutional violation of the public's right of access to criminal trials, and an unwarranted extension of this Court's recent decision in *Gannett*. For the foregoing reasons, the judgments of the courts below should be reversed.

Respectfully submitted,

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APPENDIX

Court Watch Study

Efforts to close criminal justice proceedings initiated, decided or pending from July 2, 1979 (*Gannett* v. *DePasquale*) to August 23, 1979.

Compiled by The Reporters Committee for Freedom of the Press

In cooperation with:

The American Newspaper Publishers Association
The American Society of Newspaper Editors
The Associated Press
The Associated Press Managing Editors
Gannett Newspapers
The National Association of Broadcasters
The National Newspaper Association
The Radio-Television News Directors Association
The Society of Professional Journalists
United Press International

Summary

Closures enforced or upheld on appeal since July 2, 1979	—26 cases
Closure motions refused or withdrawn	21
Closure motions made but not acted upon	— 3
Direct prior restraints on publication	— 1
	51

Type of proceedings sought to be closed:

Pre-indictment	1
Pretrial	38
Trial or conviction	10
Post-Trial	2
	51

#	CITY CASE	TYPE OF PROCEEDING CLOSURE MOTION BY	ACTION BY COURT	DATE	GROUNDS FOR SEALING PROCEEDING
1.	Media, Pa. Murder	Pretrial Defense	CLOSED to press & public UPHELD on appeal	3/28/77 7/2/79	State court closure rule
2.	Baltimore, Md. Tax fraud	Pretrial *(Fed) Defense & Prosec'n	CLOSED to press & public PENDING U.S. Court of Appeals	12/1/77 8/1/79	Grand jury secrecy
3.	Hanover Co., Va. Murder	Trial Defense	CLOSED to public & press UPHELD on appeal	9/11/78 7/9/79	Prejudice to jury
4.	Albany, N.Y. Assault	Guilty Plea Conviction Defense & Prosec'n	CLOSED to public & press UPHELD on appeal	3/7/79 8/9/79	Prejudice to jury
5.	NYC, N.Y. Murder	Pretrial Defense	CLOSED to public & press UPHELD on appeal	3/20/79 7/9/79	Prejudice to jury
6.	Los Angeles, Cal. Attempted Murder	Pretrial Defense	CLOSED to public & press UPHELD on appeal	4/23/79 6/79	Prejudice to jury
7.	Berkeley, Cal. Robbery	Pretrial Defense	Closure REFUSED	7/2/79	
8.	Oakland, Cal. Murder	Pretrial Defense	Closure motion WITHDRAWN	7/2/79 7/5/79	
9.	NYC, N.Y. Attempted Murder	Sentencing Defense	Closure REFUSED	7/24/79	
10.	Buffalo, N.Y. Assault	Prob. cause hearing Defense	CLOSED to public & press	7/6/79	Embarrass-ment to sus-pect
11.	Madison, Wis. Assault	Pretrial Defense	Closure REFUSED PENDING on appeal	7/6/79 8/1/79	
12.	Conway, S.C. Murder	Pretrial Defense	CLOSED to press OPEN to public	7/9/79	Prejudice to jury
13.	Omaha, Neb. Murder	Pretrial Defense	CLOSED to public & press	7/10/79	Prejudice to jury

*Fed = Federal Court Closures.
All Others Are State Closures.

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#	CITY / CASE	TYPE OF PROCEEDING / CLOSURE MOTION BY	ACTION BY COURT	DATE	COURT'S GROUNDS FOR SEALING PROCEEDING
14.	Oakland, Cal. Murder	Pretrial Defense	Closure REFUSED Closed to public & press on appeal	3/21/79 7/13/79	State closure law
15.	Annapolis, Md. Arson	Pretrial Defense	CLOSED to public & press	7/13/79	Prejudice to jury
16.	Rochester, N.Y. Murder	Pretrial Defense	Closure REFUSED	7/16/79	
17.	Littleton, Colo. Murder	Trial Defense	Closure REFUSED	7/17/79	
18.	Okla. City, Ok. Illegal Influence	Pretrial Prosecution *(Fed)	Closure REFUSED	7/18/79	
19.	Seattle, Wash. Murder	Pretrial Defense *(Fed)	Closure REFUSED	7/27/79	
20.	Albany, N.Y. Burglary	Pretrial Defense & Prosec'n	CLOSED to public & press	7/19/79	Prejudice to jury
21.	Madison, Wis. Murder	Pretrial Defense	Closure REFUSED	7/20/79	
22.	Albany, N.Y. Drugs	Pretrial Defense	CLOSED to press OPEN to public	7/20/79	Prejudice to jury
23.	Golden, Colo. Drugs	Pretrial Defense	Closure motion PENDING	7/23/79 8/1/79	
24.	Hunt., W. Va. Kidnapping	Pretrial Defense	CLOSED to press OPEN to public	7/24/79	Prejudice to jury
25.	Albany, N.Y. Sodomy	Trial Witness & Defense	Closure REFUSED	7/25/79	
26.	Westminster, Md. Rape	Trial (non-jury) Defense	CLOSED to public & press	7/25/79	Embarrass-ment to victim

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#	CITY / CASE	TYPE OF PROCEEDING / CLOSURE MOTION BY	ACTION BY COURT	DATE	COURT'S GROUNDS FOR SEALING PROCEEDING
27.	Oneonta, Ala. Murder	Trial Judge	NO PUBLICATION ORDER VS. PRESS.	7/26/79	Prejudice to jury
28.	Mt. Carroll, Ill Murder	Pretrial Defense	CLOSED to public & press	7/28/79	Prejudice to jury
29.	Albany, N. Y. Burglary	Pretrial Defense	Closure REFUSED	7/30/79	
30.	Kearney, Neb. Rape	Pretrial Defense	CLOSED to public & press	7/31/79	Embarrassment to victim
31.	N. Bed., Mass. Kidnap/Murder	Pretrial Defense & Prosec'n	CLOSED to public & press	7/20/79	Prejudice to jury
32.	Nash., Tenn. Bribery	Trial Defense *(Fed)	Closure motion PENDING	8/2/79 8/6/79	
33.	Papillion, Neb. Murder	Pretrial Defense	CLOSED to public & press	7/30/79	Prejudice to jury
34.	Aurora, Neb. Embezzlement	Pretrial Defense	CLOSED to public & press	7/31/79	Prejudice to jury
35.	Jefferson, Ohio Kidnap/Murder	Pretrial Defense	CLOSED to public & press	8/2/79	Prejudice to jury
36.	Okla. City, Ok. Murder	Pretrial Defense	Closure motion WITHDRAWN	7/27/79 7/30/79	
37.	Ellsworth, Maine Murder	Pretrial Defense	Closure REFUSED	7/27/79	
38.	Des Moines, Iowa Counterfeiting	Trial Defense *(Fed)	Closure motion PENDING	7/25/79 8/6/79	
39.	Okla. City, Ok. Murder	Pretrial Defense	Closure REFUSED	7/26/79	

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#	CITY CASE	TYPE OF PROCEEDING CLOSURE MOTION BY	ACTION BY COURT	DATE	COURT'S GROUNDS FOR SEALING PROCEEDING
40.	N. Platte, Neb. Murder	Pretrial Defense & Prosec'n	Closure REFUSED	8/13/79	
41.	Charlotte, N.C. Rape	Trial Prosecution	CLOSED to public & press	7/12/79	Embarrassment to witness
42.	Charleston, W.Va. Rape	Trial * (Fed) Defense	Closure REFUSED	8/16/79	
43.	Honolulu, Hawaii Attempted Murder	Pretrial Defense	Closure REFUSED	7/18/79	
44.	Riverhead, N.Y. Murder	Pretrial Defense	CLOSED to public & press Closure REVERSED	8/8/79 8/15/79	Prejudice to jury
45.	Grand Rapids, Mich. Murder	Pretrial Defense	Closure REFUSED	7/2/79	
46.	Honolulu, Hawaii Rape	Pretrial Defense Trial Defense	CLOSED to public & press Closure REFUSED	7/23/79 7/23/79	Embarrassment to defendant
47.	Napa, Cal. Murder	Pretrial Defense	CLOSED to press & public	7/18/79	State Closure Law
48.	Antigo, Wisc. Murder	Pretrial Defense & Prosec'n	OPEN to public CLOSED to press (except press which agreed to suppress news)	8/7/79	Prejudice to jury
49.	Oakland, Cal. Murder	Pretrial Defense	CLOSED to public & press	8/16/79	State Closure Law
50.	Dallas, Oregon Assault	Pretrial Defense	Closure REFUSED	8/10/79	
51.	NYC, N.Y. Bribery	Post-trial *(Fed) Defense	CLOSED to public & press	7/31/79	Prejudice to future jury

Supreme Court, U. S.
FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN MCCARTHY,
Appellants,

v.

COMMONWEALTH OF VIRGINIA
Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN MCCARTHY,
Appellants,

v.

RICHARD H.C. TAYLOR,
Appellee.

On Appeal From The Supreme Court of The Commonwealth of Virginia

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS IN SUPPORT OF APPELLANTS

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IN THE

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Appellee.

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS IN SUPPORT OF APPELLANTS

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") submit this

brief *amici curiae* in support of Appellants Richmond Newspapers, Inc., et al. All parties to this suit have given ANPA and ASNE written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,360 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. Richmond Newspapers, Inc. and twenty-six other newspapers in the Commonwealth of Virginia are members of ANPA.

ASNE is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of the "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Both ANPA and ASNE are committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate reports of the affairs of government—be they executive, legislative, or judicial. For "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975). This Court has consistently recognized the important role played by a free press in providing such information to the public and has acknowledged both the right of the press to report on and the public's right to be informed of incidents of judicial proceedings. See, *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Oklahoma Pub. Co. v. District Court of Oklahoma County*, 430 U.S. 308 (1977); *Nebraska Press Association v. Stuart*, 427 U.S. 536 (1976).

This Court's decision last term in *Gannett* v. *DePasquale*, ____U.S.____, 61 L.Ed.2d 608 (1979), while ostensibly based on the Sixth Amendment, seemed to negate, or at least draw into question, much of the learning espoused in the Court's prior rulings. As the result of an apparent misconception of the *Gannett* decision, the Supreme Court of Virginia has sanctioned the closing of an entire criminal trial.

In light of the constitutionally prescribed role of our free press in presenting for public debate matters of official concern, and the fact that "[t]he operations of the courts and the conduct of judges are matters of utmost public concern," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), your amici are alarmed that a senior state court has determined that this Court's holding in *DePasquale*, *supra*, has led to a conclusion that criminal trials can be held in secret. Your amici strongly dispute the Supreme Court of Virginia's resolution of the constitutional values involved. The Supreme Court of Virginia's reliance on *DePasquale* for the proposition that entire criminal proceedings may be closed to the public is clearly erroneous and, should it be permitted to stand, would lead federal and state trial courts to routinely disregard their judicial responsibility to safeguard the constitutional rights of the citizenry under the First, Sixth, Ninth and Fourteenth Amendments.

STATEMENT OF THE CASE AND CONSTITUTIONAL PROVISIONS INVOLVED

Your amici adopt the statement of the case as set forth in the Brief for Appellants filed by Richmond Newspapers, Inc.[1] Your amici submit, however, that in addition to the constitutional provisions of the First, Sixth and Fourteenth Amendments, cited by Appellants therein, this case involves the Ninth Amendment, which provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

SUMMARY OF ARGUMENT

We would urge upon the Court that in light of the fact that as of October 8, 1979 there had been more than fifty closures of judicial proceedings in the form of pretrials, trials or sentencings, the Court should summarily reverse the Supreme Court of Virginia's reliance on *Gannett v. DePasquale, supra*. This would be in keeping with the views of the minority in that case and in keeping with the views of Justice Stevens, joined by Justices Brennan and Powell in dissent in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), where Justice Stevens said: "By express command of the Sixth Amendment the proceeding must be a 'public trial.' It is important not only that the trial itself be fair,

[1] Being aware of this Court's stated reservations as to its jurisdiction in this case, your amici urge, that should the Court determine that it lacks jurisdiction through appeal under 28 U.S.C. § 1257(2), the Court should treat "the papers whereon the appeal was taken as a petition for writ of certiorari" and grant the petition. *See*, Pennsylvania v. Board of Directors, 353 U.S. 230, *reh. denied*, 353 U.S. 989 (1957).

but also that the community at large have confidence in the integrity of the proceeding." *Id.* at 36-37.

Not only should this Court summarily reverse the Supreme Court of Virginia but we most respectfully urge the Court to review its holding in *DePasquale, supra*. We would hope to persuade the Court that in our Republic no judicial proceeding should ever be closed to the public and concurrently to the press except in the rarest of cases and then under standards spelled out by this Court.

While in *DePasquale* this Court found no occasion to address or delineate the First Amendment interests affected by the closing of judicial proceedings, your amici submit that such interests are necessarily implicated whenever a decision is made to hold part or all of a judicial proceeding in secret. Although neither the literal language of the First Amendment nor of the Sixth Amendment explicitly provides a right of the public to attend criminal judicial proceedings, such a right flows from an analysis of the goals which those amendments were intended to achieve. Absent recognition of such a right, the specific rights guaranteed will be less secure.

Further, your amici contend that, even if the First and Sixth Amendments do not provide a right of the public and the press to attend judicial proceedings, this right has been reserved to the people under the Ninth Amendment. The latter was included in the Bill of Rights to guard against advancement of the theory that the enumeration of certain rights implied the disparagement or nonexistence of other fundamental rights. Historical analysis, such as that engaged in by Justice Blackmun in *DePasquale*, demonstrates that there was an unbroken tradition of open judicial proceedings both in England and colonial America. The Framers of the Constitution and the Bill of Rights never intended to put an end to that tradition; rather, they understood it to be the established course of common law which would be carried forward

under the Constitution. See, III STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 662 (1833).

Finally, your amici contend that in those rare instances where a part of a judicial proceeding is to be closed to the public and press, such a closing may only be allowed after a strong showing of a clear and present danger to the fair administration of justice, and a strong indication that alternative measures will be ineffective in preserving the fairness of the proceeding.

Any analysis of the right of the public and press to attend judicial proceedings, whether under the First, Sixth and/or Ninth Amendments, requires an exploration of the historical background which led to adoption of those amendments. Such an exploration demonstrates that the right to open judicial proceedings has long been viewed to be of utmost importance.

Mankind has sought since earliest recorded times to cast the light of publicity on the functioning of its governmental bodies irrespective of whether it related to a legislative, executive or judicial branch of government, in whatever form. The first reference to this social phenomenon found by your amici, dating back to the fifteenth century B.C., is:

> Lo, whenever an administrator hears cases let there be publicity and let water and air report all that he may do. Lo, then his conduct is by no means unperceived. If he does anything (unseemly) and he is to blame he is not to be reinstalled on the authority of an acting official but men shall learn of it on the authority of his (proper) judge...[2]

[2] From the tomb of Rekhmire, Vizer to Tuthmosis III, King of Egypt, XVIII dynasty (1580-1321 B.C.).

Turning to our own legal heritage, the following from H. CROSS, THE PEOPLE'S RIGHT TO KNOW, (1953) accurately reflects our Common Law history:

> *I have something to say to the court about the first fundamental liberty of an Englishman in order to his trial; which is that by the laws of this land all courts of justice ought to be free and open for all sorts of peaceable people to see, behold, and hear, and have free access unto...and yet, Sir, as I came in, I found the gates shut and guarded, which is contrary to law and justice.*
>
> Thus, in 1649, charged with high treason, spoke John Lilburne. Such was the law of England, and his request was granted. While he was the first to "make the news" in a reported case, the practice of having trials open to the public was already of long standing in the common law.
>
> Both Hale and Blackstone state that evidence is presented in open court in the presence of all bystanders. Bishop, in his work on the criminal law, asserts that "from immemorial usage wherever the common law prevails, all trials are in open court to which spectators are admitted." The origin of the practice is more obscure than evidence of its ancient existence. Yet origin may have some bearing on the question whether the right belongs to the accused alone (in which event he might waive it and thus, with the prosecution's acquiescence, close the trial) or whether it may be claimed in behalf of the public by a representative thereof.
>
> The United States Supreme Court has said that the traditional Anglo-Saxon distrust of secret trials has been variously ascribed to the notorious use thereof by the Spanish Inquisition,

to the excesses of the English Court of Star Chamber, and to the French Monarchy's abuse of the *lettre de cachet*. Inquisition, Star Chamber, and *lettre de cachet* symbolized a menace to liberty; each had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of the accused to a fair trial.

* * *

But whatever its origin the common law concept of a public trial had come to be regarded (at the time of the adoption of the Sixth Amendment) as an essential guarantee against attempts to employ the courts as instruments of persecution. The knowledge that every criminal trial was subject to contemporaneous review in the forum of public opinion was regarded as an effective restraint on possible abuse of judicial power. It was also thought that if trials were public important witnesses unknown to the parties might thus be informed of developments and voluntarily come forward to testify, and spectators might learn enough about the administration of the law to acquire confidence in seeking judicial remedies for their own real or fancied wrongs.[3]

It was against this background that the Bill of Rights evolved. The Commonwealth of Virginia adopted protection of the right of free speech and press well before the adoption of same in the Constitution of the United States. This protection sounded in the struggle during Colonial times which eventuated in the Revolutionary War and brought about a realization on the part of revolutionary

[3] H. CROSS, THE PEOPLE'S RIGHT TO KNOW, 155-56 (1953).

statesmen such as Jefferson, Madison, Bushrod Washington, Adams, Hancock, Mason and others, that contrary to the unwritten Constitution of the Mother Country, in order to ensure the rights of the people of the aborning country, some basic philosophies would have to be placed in specific language in a written constitution for all under a republican form of democracy. In reaching these conclusions, it is clear from the early writings that one right upon which there existed no doubt was that, in the tradition of England, open trials went back to the Middle Ages. At one time they were the primary social event of villages and towns in England, Scotland, Wales and Ireland. It is clear that there was never any doubt in the minds of our constitutional forebearers that the right of open trial was a right so clearly preserved to the people that it need not be spelled out in the Constitution; as will be shown later, it was one of those immemorial basic rights which are guaranteed under the Ninth Amendment.

The states refused to adopt the Constitution unless a Bill of Rights was adopted. When the Senate of the United States sent twelve proposed amendments to the people for ratification, Article the Eleventh read, "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The House of Representatives sent to the Senate an Article XIV: "no state shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor freedom of speech, or of the press." When these proposals were sent from the Senate to the states, freedom of religion, speech and press, the right of the people to peaceably assemble and to petition the government for a redress of grievances were placed in Article the Third and the right of an accused to enjoy a speedy and public trial was placed under Article the Eighth. Since the people

refused to ratify Article the First and Article the Second, Article the Third became the First Amendment and Article the Eighth became the Sixth Amendment.[4]

This Court has frequently held that the First Amendment not only guarantees the freedom to speak and to publish but also the freedom of the public to receive informational ideas. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). In so doing the Court has recognized that the First Amendment was intended to ensure both free and *informed* discussion of governmental affairs. Especially in connection with the judicial branch of government, the Court has recognized that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978). *See Nebraska Press Association* v. *Stuart* 427 U.S. 539 (1976); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). Open judicial proceedings promote the goals of the First and Sixth Amendments by subjecting the judicial process to public scrutiny and by assuring judicial accountability and fairness for criminal defendants as a result of such scrutiny. While neither amendment explicitly provides that judicial proceedings shall be open, the guarantees sought to be provided therein cannot be achieved in the absence of recognition that a right of attendance at judicial proceedings is encompassed in those amendments.

In *DePasquale*, only Justice Powell considered the First Amendment interests at stake. Your amici believe that a proper consideration of the interplay of the First and Sixth Amendments, when considering the closing of

[4] Appendix "A" to Report of American Newspaper Publishers Association on Free Press and Fair Trial.

judicial proceedings, leads to the conclusion that such proceedings may be closed only in the rarest of circumstances. Should the Court be unable so to conclude, however, we submit that open judicial proceedings are a guarantee to the people encompassed within the Ninth Amendment and the emanations of the First and Sixth Amendments. When it was determined that a Bill of Rights was required, the Ninth Amendment was inserted specifically to ensure that those fundamental rights not enumerated in the first eight amendments would not be lost. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627 (1956). The historical background recited by Justice Blackmun, dissenting in *DePasquale*, fully supports the proposition that open judicial proceedings were a tradition of such long standing at common law, that the Framers could not have intended to sacrifice such a fundamental right by failing explicitly to enumerate it in the first eight amendments. In *DePasquale*, this Court seemed to suggest that the "public trial" guarantee of the Sixth Amendment is not a guarantee to the public but one which belongs to the criminal defendant, and possibly the prosecutor and the trial judge. Your amici suggest that analysis of the First and Ninth Amendments, as well as the Sixth Amendment, and the penumbras surrounding them requires recognition of the immemorial tradition of open judicial proceedings.

Whether the right to open judicial proceedings lies in the First, Sixth and/or Ninth Amendments, it has been suggested that the right may be overridden. *Gannett* v. *DePasquale*, *supra* at 629; *Id.* at 632 (Powell, J. concurring). In light of *Nebraska Press Association* v. *Stuart*, *supra*, your amici are aware that there may be rare instances in which a criminal defendant's Sixth Amendment rights may take precedence over other constitutional rights. *Id.* at 551. Recognizing the distinction between cases involving prior restraints on publication,

and those involving the public's right to attend criminal proceedings, your amici submit that the latter right is a fundamental one of constitutional stature requiring the same degree of judicial protection set forth in *Nebraska Press*. Nothing less than a strong showing of clear and present danger to the fairness of the proceeding must be required prior to closing a criminal trial.

Your amici urge this Court to clarify the confusion which has ensued from the recent *DePasquale* decision. Whether it be based in the First, Sixth or Ninth Amendments or in the emanations stemming from the guarantees contained therein, the right of both the public and the press to attend criminal proceedings is of vital importance to our form of democracy and is mandated by the Constitution.

ARGUMENT

In the instant case, the Supreme Court of Virginia summarily dismissed appellants' petitions for writ of mandamus and writ of prohibition and refused appellants' petition for appeal, without opinion, merely citing this Court's recent decision in *Gannett Co., Inc. v. DePasquale*, *supra*. In so doing the Supreme Court of Virginia sanctioned the closing of entire criminal trials. Yet, despite the confusion which has been caused by the majority opinion in *DePasquale*, it is clear that at least seven members of this Court are of the opinion that criminal trials *must* be public in the absence of extraordinary circumstances mandating the imposition of reasonable restrictions to safeguard the rights of the defendant and the public alike.

Justices Blackmun, Brennan, White and Marshall, dissenting in *DePasquale*, stated that no part of any criminal proceedings should be closed "unless a defendant carries his burden to demonstrate a strict and inescapable

necessity for closure." *Id.* at 661. Chief Justice Burger filed a separate concurring opinion in *DePasquale* to emphasize his view that the majority opinion was applicable only to pretrial proceedings. Finally, although Justices Stevens and Powell joined the majority opinion in *DePasquale*, both had unequivocally stated that the Sixth Amendment prohibits closed trials, as recently as the last term. Justice Stevens, joined in dissent by Justices Brennan and Powell in *Houchins v. KQED, Inc.*, *supra*, wrote:

> [A] trial. . .must conform to the dictates of the Constitution. By express command of the Sixth Amendment the proceeding must be a "public trial." It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding.

Id. at 36-37 (footnotes omitted).

Given the stated positions of these seven members of the Court, it is inconceivable that they would permit to stand the closing of an entire criminal proceeding on the sole basis of the defendant's complaint that: "I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what." Jurisdictional Statement, App.D at 7a. If, indeed, a criminal trial ever may be closed in its entirety to the public, such a basis for closure falls far short of meeting the *Standards Relating to Fair Trial and Free Press* approved by the American Bar Association House of Delegates[5] and fails entirely to comport with the guarantees of the First, Sixth, Ninth and Fourteenth Amendments.

Nevertheless, the very fact that the Supreme Court of Virginia has sanctioned a closing on such grounds demonstrates the confusion which has arisen as a result of this

[5] See Appendix A

Court's decision in *DePasquale*. As has been noted previously, the massive misinterpretations emanating from the *DePasquale* decision have resulted in more than 50 closings of judicial proceedings (pretrial, trial and post-trial). Your amici respectfully urge this Court not only to summarily reverse the decision of the Supreme Court of Virginia, but also to grasp this early opportunity to review the decision rendered in *Gannett v. DePasquale, supra*. The following arguments are submitted in an effort to aid the Court in considering the constitutional guarantees which must be examined and balanced where the rights of defendants and the public to open judicial proceedings come into conflict.

I

A RIGHT OF THE PUBLIC AND THE PRESS TO ATTEND JUDICIAL PROCEEDINGS LIES IN THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

An essential protection against arbitrary and oppressive exercise of the powers delegated to our federal and state governments lies in the First Amendment freedoms of speech and press. The freedom of speech permits the unfettered communication of political grievances. In addition, it forecloses governmental control or manipulation of the sentiments uttered by and to the public and, by protecting our right to full information concerning the doings or misdoings of governmental officials and institutions, whether they be judicial, legislative or executive, it guards against the maladministration of government. Thus, the right of the public to speak and the press to publish is unfulfilled without a correlative public right to receive information. See generally, Emerson, *Legal*

Foundations of the Right to Know, 1976 WASH. U.L.Q., 6-7 (1976); Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977). This Court has recognized this right on several occasions. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), this Court struck down a city ordinance prohibiting the posting of real estate "For Sale" or "Sold" signs, based on both the speaker's right to communicate and the listener's "First Amendment interest in the subject matter of the speech." *Id.* at 92. *See also Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976). The case of *Procunier v. Martinez*, 416 U.S. 396 (1974) recognized a right to receive personal correspondence. This Court further has held that both "a labor organizer's right to speak and the right of workers 'to hear what he had to say,'...were abridged by a state law requiring organizers to register before soliciting union membership." *Kleindienst v. Mandel*, 408 U.S. 753 at 763 (1972), citing *Thomas v. Collins*, 323 U.S. 516 (1945).

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court noted that "[It] is now well established that the Constitution protects the right to receive informational ideas. . . This right to receive informational ideas . . . is fundamental to our free society." *Id.* at 564. And in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), the Court referred to a right to receive information as falling within the penumbra of the First Amendment freedoms of speech and press.

Your amici submit that the First Amendment was intended to protect both free and *informed* discussion of governmental affairs and that the flow to the public of

information on the conduct of judicial proceedings necessarily is encompassed within the protections of the First Amendment.[6]

Over thirty years ago, this Court held: "A trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). This principle is more than simply an observation that criminal defendants generally elect to exercise their Sixth Amendment right to public trial; rather, it reflects the belief that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), which therefore must be open to public scrutiny and comment. Your amici respectfully submit that cases such as *Craig v. Harney, supra, Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976), and *Oklahoma Publishing Company v. District Court of Oklahoma County*, 430 U.S. 308 (1977) cannot be construed to rest solely on the narrow ground that the First Amendment prohibits prior restraints on publication. They reflect the common understanding that open judicial proceedings protect the public's right to know and preserve "the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. 358, 364 (1970). Thus, open criminal proceedings, which make possible contemporaneous public scrutiny and comment on our judicial system, "are of critical importance to our type of government in which

[6] Information gathering is clearly entitled to variable degrees of constitutional protection. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Pell v. Procunier, 417 U.S. 817, 833 (1974). This protection necessarily complements that protection accorded the public under the First Amendment to receive information and ideas. See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 756 (1976); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266-270 (1964); Stanley v. Georgia, 394 U.S. 557 (1969).

the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

At the same time, public attendance at criminal trials, and the publicity and debate it generates, promotes that fair treatment which the Sixth Amendment public trial guarantee is designed to provide. "[J]ustice cannot survive behind walls of silence," and "[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. The press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 349, 350 (1966); see also, *Cox Broadcasting Corp. v. Cohn, supra* at 492 (1975). In holding, *inter alia*, that secret proceedings were violative of the Fourteenth Amendment, this Court quoted Jeremy Bentham as follows:

> . . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all of the checks are insufficient: in comparison of publicity, all other checks are of small account.

In Re Oliver, 333 U.S. 257, 271 (1948).

One contemporary commentator has argued that:

> recognizing a[n] [independent] right of attendance [at criminal judicial proceedings] would actually promote the protective policies of the Sixth Amendment. Individual defendants are given the right of public trial on the theory

> that their enforcement of the right will preserve the norm of openness and thus achieve the goal of fairness. Ultimately, the goal is fairness for *all* defendants, and its attainment depends upon public awareness, discussion, and criticism of the criminal process. Public scrutiny of criminal prosecutions, and especially of pretrial proceedings, preserves and enhances the quality of criminal justice.

Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1325. (1978) (Footnotes omitted)

Thus, although neither the First Amendment nor the Sixth Amendment alone *explicitly* provides an independent right of the public to attend criminal judicial proceedings, a constitutional basis for a penumbral right of attendance arises nonetheless from the interplay of these two constitutional texts. Attendance at criminal judicial proceedings promotes the protective policy of the First and Sixth Amendments by subjecting the judicial process to public scrutiny which both informs the people of the operations of their judiciary and, over the long term, secures judicial accountability and fairness for criminal defendants. Therefore, to assure implementation of these dual, fundamental constitutional goals, this Court should recognize a qualified constitutional right on the part of both the public and its representative, the news media, to attend criminal proceedings, and speak and publish on the events that transpire at such hearings.

This Court on previous occasions has upheld claims of constitutional rights which are not explicitly encompassed within the text of a single constitutional provision. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) (plurality opinion), the Court struck down a state statute which penalized the use by married couples of "any drug, medicinal article, or instrument for the purpose of preventing

conception." The Court held that such a statute violated a constitutional right of privacy which is not found in the express terms of a constitutional amendment, but which emanates from the First, Third, Fourth, Fifth and Ninth Amendments, each of which has "a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. Justice Douglas, writing for the Court in *Griswold*, also discussed the penumbra surrounding the explicit terms of the First Amendment:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parent's choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> * * * *
>
> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. *Without those peripheral rights, the specific rights would be less secure.* (citations omitted) (emphasis added).

Id. at 482

Thus, in assessing the existence or nonexistence of a constitutional right, this Court is not limited to strict statutory construction of the explicit guarantees found in one or more constitutional amendments. It may focus "on the nature of the activity at issue and the extent to which the allowance—or encouragement—of that activity is

necessary to achieve the goals of separate texts. Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1327 (1978).

Griswold cites two other cases where this functional analytical approach was taken in recognizing a non-explicit constitutional right. In *NAACP v. Alabama*, 357 U.S. 449 (1958) this Court looked at the activity involved—the anonymous association with others for the purpose of promoting a political cause—and found that it was not expressly protected under the terms of either the free speech clause or the free assembly clause of the First Amendment. Nonetheless, the Court found that such activity promoted the fundamental purposes of each clause, while denial of constitutional protection over such activity would undermine those purposes. As a result, the Court found "in the close nexus between the freedoms of speech and assembly," a constitutional right of association.

In *Boyd v. United States*, 116 U.S. 616 (1886), a constitutional challenge was raised to a state statute which authorized the compulsory production by citizens of their personal records for use as physical evidence against their owner. The Court found that the statute was not invalidated under a literal interpretation of the Fourth Amendment prohibition on "unreasonable searches and seizures" or the Fifth Amendment prohibition on compelling a person "to be a witness against himself." The Court found that in protecting individual privacy and security, the Fourth and Fifth Amendments "run almost into one another." After an analysis of the historical underpinnings of the Fourth and Fifth Amendments, the Court determined that "a close and literal construction [would] deprive them of half their efficacy and lead to gradual depreciation of the right[s]" guaranteed thereunder. The Court, therefore, held the statute unconstitutional as violating the meaning and thrust of the

Fourth and Fifth Amendments, despite the particular wordings of those Amendments.[7]

Thus, where two disparate constitutional provisions may reinforce one another to a significant degree, they may be considered, in combination, to sustain a constitutional right which effectuates their policies but which cannot be found in the express language of either provision. There being no dispute that public criminal proceedings promote fair treatment before the courts of this country, through judicial accountability and "public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978), a defendant's election to close presumptively open judicial proceedings may be subjected to constitutional limitation and, as Justice Powell has stated in *Gannett v. DePasquale*, ___U.S.___, 61 L.Ed.2d 608, 632 (1979), closure must not be permitted unless the public's First and Sixth Amendments rights to attend are balanced against a compelling state interest in closure.

II

THE IMMEMORIAL TRADITION OF OPEN JUDICIAL PROCEEDINGS IS A FUNDAMENTAL RIGHT RETAINED BY THE PEOPLE UNDER THE NINTH AMENDMENT

To a considerable degree, the controversy in this case has centered on the question of whether the First or Sixth

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[7] The need for an analysis which goes beyond the express terms of the Bill of Rights and confers protection on those personal rights necessary to give meaningful effect to the express guarantees was adverted to by Justice Brennan in Lamont v. Postmaster General, 381 U.S. 301 (1965):

> "[T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from abridgement those equally fundamental personal rights necessary to make the express guarantee fully meaningful." *Id.* at 308 (Brennan, J., concurring).

Amendments, or both of them, guarantee to the public the right to attend trials. That is, to be sure, the first question to be addressed by the Court since an affirmative answer would—as we have urged—require reversal in this case. But it is not the only question.

If, for any reason, the Court should conclude that neither the First nor the Sixth Amendment, of their own force, protects the right of open judicial proceedings, the Court could and, we believe, should nonetheless rule that the Ninth Amendment protects that right.

The Ninth Amendment was added to the Constitution to preclude any risk that courts would apply the maxim *expressio unius est exclusio alterius* to the Bill of Rights. Many state conventions had opposed ratification of the original Constitution unless a bill of rights was included, but concern was expressed that inclusion of such a document would do more harm than good. One opponent, for example, argued:

> There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.

1 ANNALS OF CONGRESS 747 (Gales & Seaton ed. 1834) (Rep. Jackson of Georgia). *See* G. WOOD, THE CREATION OF AMERICAN REPUBLIC 537-40 (1969).

Alexander Hamilton, as well, had objected to the adoption of a Bill of Rights on the ground, *inter alia*, that to enumerate such rights might permit the disparagement of others. *See* The Federalist No. 84 (A. Hamilton), at 559 (Modern Library ed.)

Answering such objections on the floor of the House of Representatives, James Madison stated:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments that I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

1 ANNALS OF CONGRESS, *supra*, at 439.

The result was the Ninth Amendment.[8] Drafted by Madison, it was adopted simply to insure "that by enumeration of rights in the Constitution *nothing has been lost;* that the rights of the people would have rested on as firm ground without enumeration, because they do not lie within the purview of powers granted to Congress". Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 643 (emphasis in original) (1956).[9]

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[8] It provides:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

[9] *Accord, e.g.*, 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 626-27, 651 (6th ed. 1891); Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. REV. 787, 805 (1962); Note, *The Ninth Amendment: Guidepost to Fundamental Rights*, 8 WM. & MARY L. REV. 101, 102-07 (1966).

The right to attend criminal proceedings, we submit, is a right "retained by the people" within the meaning of the Ninth Amendment. It was common ground for the majority and the dissenters in *Gannett* that the right of the people to attend judicial proceedings is deeply rooted in our common law traditions. *See* 61 L. Ed. 2d 624-26 & nn.15 & 18; *id.* at 646-55 (Blackmun, J., joined by Brennan, White & Marshall, JJ., dissenting). *Cf. id.* at 630 (Burger, C.J., concurring) ("It is the practice of Western societies, and has been part of the common law tradition for centuries, that trials generally be public."); *id.* at 632 (Powell, J., concurring) (by implication) (recognizing First Amendment right based on "the importance of the public's having accurate information concerning the operation of its criminal justice system"). *Accord, In re Oliver*, 333 U.S. 257, 266 (1948).

From ancient times in England, through the periods of Anglo-Saxon rule, Norman conquest and the rebellion of the Royal colonies in America, there was an unbroken tradition of open judicial proceedings in criminal cases. Trials were conducted "openlie in the presence of Judges, the Justices, the enquest, the prisoner, and so manie as well or can come so neare as to heare it, . . . that all men may heare from the mouth of the depositors and witnesses what is saide." *Gannett, supra*, 61 L. Ed.2d at 647 (Blackmun, J., dissenting) (quoting T. Smith, De Republica Anglorum (Alston ed. 1972)).

Although the *Gannett* majority cites several twentieth century commentators who regard enactment of the Sixth Amendment right of public trial as reflecting the evolution of a personal right, or at least primarily a personal right, of the accused, 61 L. Ed.2d at 622, n.9, the English judicial system began requiring public trials at a time when that system had very little regard for the rights of

the accused. See 31 N.Y.U. L. REV. 611 (1956); 6 J. WIGMORE, EVIDENCE § 1834 (J. Chadbourne rev. ed. 1976) and authorities cited therein. Criminal proceedings were uniformly held in public long before criminal defendants were first accorded such protections as the right to counsel, jury trial, prior notice of the charges, and the right to confrontation—protections subsequently incorporated into the United States Constitution and proposed by the First Congress to the legislatures of the several states for ratification in 1789. The public right to attend a trial therefore arose entirely independently of the subsequent recognition that public proceedings may also serve to protect criminal defendants from judicial overreaching.

It is a fundamental tenet of the common law, both in England and in America, that trials are to be public occurrences. This right of the people to access to judicial proceedings is founded on the belief that courts are public instrumentalities and that their activities are a proper matter for public scrutiny. Lord Coke, commenting upon the words "*In curia domini regis*" as they are used in the Statute of Marlebridge, 1267, 52 Hen. 3, c.1, said:

> These words are of great importance, for all causes ought to be heard, ordered, and determined before the Judges of the Kings Courts openly in the Kings Courts, whither all persons may resort; and in no chambers or other private places.

2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND, 103-04 (6th Ed. 1681).

This heritage of the common law has been evident in American jurisprudence from the earliest days of the colonies. Its first appearance in a public document may have been the Charter of the Fundamental Laws of New Jersey, drafted in 1676, whose Chapter XXIII provided:

> That in all publick courts of justice for tryals of causes, civil or criminal any person or persons,

> inhabitants of the said Province, may freely come into, and attend said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner, being intended and resolved, by the help of the Lord, and be these our Concessions and Fundamentals, that all and every person and persons inhabiting the said Province shall, as far as in us lies, be free from oppression and slavery.

5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS, 1492-1908, at 3060.

This right of the people that the court of justice shall be public was included in the Bill of Rights of many states and territories. The most common phrase was: "That all courts shall be open."[10]

In 1789, the Congress enacted the Sixth and Ninth Amendments. In commenting on the argument raised by Alexander Hamilton and others, that a Bill of Rights was unnecessary or undesirable because the Federal Government was a government of delegated powers without authority in any event to intrude upon fundamental personal rights, Mr. Justice Story wrote:

> In regard ... [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in

[10] Constitutions of Alabama 1819, Sec. 14, 1 Thorpe, p. 97; Colorado 1876, Art. II, Sec. 6, *Id.* p. 475; Connecticut 1818, Art. I, Sec. 12, *Id.* at 538; Delaware 1792, Art. 1, Sec. II, *Id.* at 1058; Kansas 1855, Art. I, Sec. 16, *Id.* at 1181; Kentucky 1792, Art. XII, Sec. 13, 3 Thorpe at 1275; Nebraska 1867, Art. I, Sec. 9, 4 Thorpe at 2350; North Dakota 1889, Art. I, Sec. 22, 5 Thorpe at 2858; Ohio 1851, Art. I, Sec. 16, *Id.* at 2915; South Dakota 1889, Art. VI, Sec. 20, 6 Thorpe at 3371; Tennessee 1870, Art. I, Sec. 17, *Id.* at 3450, Wyoming 1899, Art. I, Sec. 8, 7 Thorpe at 4418.

> favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis.... But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.

II STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1867 at 626-627 (5th ed. 1891).

In *Gannett v. DePasquale, supra,* this Court was not presented with, and therefore did not address, the argument that an immemorial right to attend judicial proceedings is reserved to the people under the Ninth Amendment. Justice Stewart based his decision upon analysis of the Sixth Amendment.[11] He interpreted the failure of the Congress to explicitly prescribe in the Sixth Amendment an independent public right of open proceedings as a decision to elevate the defendant's right to protection from a biased jury over and above the public's protection from secret proceedings. Yet, we respectfully submit that Justice Blackmun is correct in saying, "there is no indication that the First Congress in proposing what became the Sixth Amendment meant to depart from the common law practice" of open proceedings. *Gannett v. DePasquale, supra* at 651 (Blackmun, J., dissenting opinion). Although the historical debate between Justice Stewart (see 61 L.Ed.2d at 624-28) and Justice Blackmun (61 L.Ed.2d at 646-55) points up the fact that history

[11] Justice Stewart declined to decide whether members of the press and public have a right of access to judicial pretrial proceedings under the First and Fourteenth Amendments because "even assuming *arguendo* that the First and Fourteenth Amendments may guarantee such access ... this putative right was given all appropriate deference by the state *nisi prius* court in the present case." 61 L.Ed.2d at 629.

unfortunately sheds little clear light on the specific intention of the authors of the public trial guarantee, see generally F. HELLER, THE SIXTH AMENDMENT TO THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT (1951), your amici respectfully submit that the public trial provision of the Sixth Amendment was not intended to protect defendants from press comment. Rather, it was intended to protect defendants and the public from abuse of judicial authority. See *In Re Oliver*, 333 U.S. 257, 268, 270-273 (1948) ("Contemporaneous review of criminal trials in the forum of public opinion constitutes an effective restraint on possible abuse of judicial process." *Id.* at 270); T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION, 647 (8th ed. 1977).

Another clause of the Sixth Amendment guarantees an accused a trial before an impartial jury. And there is no historical evidence to suggest that the framers contemplated the opposite of a public trial, guaranteed in one part of the Sixth Amendment, as a legitimate means of securing an impartial jury, which is guaranteed in another.

In discussing the intent of Congress in enacting the public trial, as opposed to fair trial, guarantee, Justice Story noted:

> In declaring, that the accused shall enjoy the right to a speedy and public trial [the Sixth Amendment] does but follow out the established course of the common law in all trials for crimes. The trial is always public.

III STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 662 (1833).

Unlike some common law rules, such as the disqualification of witnesses because of interest, the requirement that judicial proceedings are public is not a mere

form whose justification has long since faded, a relic of a bygone era. Instead, as both the majority and dissent in *Gannett* recognized, public access to criminal proceedings is an integral and necessary part of a democratic government. Public belief in, and support of, the process of justice is crucial to a government that is based on the consent of the governed. The public's perception that justice is being done is especially important when the government through the criminal process denies a citizen liberty or even life itself.[12] But this is not the only value served by continuing to keep the courts open to the public. The courts are servants of the people, who are entitled to observe and evaluate the efficiency, comportment, and dedication of judges, prosecutors, and other attorneys.

This social interest in public trials is of overriding importance independent of, and qualitatively different from, other constitutionally protected interests. No one could doubt, for example, the enormous societal interest in the swift and fair administration of justice, *see Barker v. Wingo*, 407 U.S. 514, 519 (1972), or in having a criminal case heard by a jury, *see Patton v. United States*, 281 U.S. 276, 312 (1935). But the openness of criminal trials is a right which is more fundamental still, for its principal purpose is to ensure the maintenance of other specific rights such as the two listed above. It would thus be entirely consistent to recognize a Ninth Amendment right of access to trials and not recognize similar rights of

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[12] See 3 W. BLACKSTONE, COMMENTARIES 372; M. HALE, THE HISTORY OF THE COMMON LAW IN ENGLAND 344 (6th ed. 1820). These values were recognized by the Gannett majority, 61 L. Ed.2d at 623-24 as well as the dissent, which authoritatively canvassed the history. *Id.* 646-49. The majority and dissent differed only on the weight to be accorded these values in the context of a Sixth Amendment analysis. The resolution of the disagreement with respect to the Sixth Amendment in no way forecloses the distinct analysis suggested here in the context of the Ninth Amendment.

the public to compel a speedy trial or a trial by jury, beyond those set forth in the Fifth and Sixth Amendments themselves. A long-delayed bench trial, for example, though hardly desirable in any respect, may nonetheless be tolerable because the trial, when it does take place, *will* be open to the public so that all may judge whether the delays were supportable and the proceedings just. Yet one need only imagine the public response to, say, a criminal case repeatedly continued at the defendant's request then tried only to the court, in secret, and finally dismissed on an unexplained verdict of "not guilty," to realize the necessary preeminence of the right of public access to trials.

This Court has not hesitated to conclude that the dictates of history and the requisites of our democratic form of government require that certain constitutional rights be recognized, notwithstanding the fact that there is no explicit reference to them in the Constitution itself. That is precisely the path this Court takes when determining whether a certain right is so fundamental to the "Anglo-American regime of ordered liberty" that it is enforceable against the states under the due process clause of the Fourteenth Amendment. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968). Indeed, this Court has frequently examined the interstices of the Constitution to find rights not specifically enumerated in the text. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), for example, the Court struck down a state statute that penalized the use by married couples of "any drug, medicinal article, or instrument for the purpose of preventing conception." The right of privacy relied upon by the Court was found nowhere in the express terms of the Constitution but was held to be of constitutional stature nevertheless. It emanates from the First, Third, Fourth, Fifth, and Ninth Amendments, each of which has "a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. *Cf. id.* at 500 (Harlan, J., concurring) (right of privacy is "implicit in the concept of ordered liberty" protected by due process and need not be based in any specific guaranty of Bill of Rights).

Nor is this mode of analysis limited to protection of highly personal rights such as marital privacy. It has been accepted at least since *Embrey v. Palmer*, 107 U.S. 3 (1882), that state courts must respect the judgments of federal courts, although neither the full faith and credit clause of the Constitution, U.S. Const. art. IV, § 1, nor its implementing statute, Act of May 26, 1790, Ch. XI, 1 Stat. 122 (now codified at 28 U.S.C. § 1738 (1976)) may fairly be read to require such a result. Similarly, one may search Article II of the Constitution in vain for any mention of executive privilege, but there is now no question that the privilege exists:

> [T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

United States v. Nixon, 418 U.S. 683, 705-06 (1974) (footnote omitted).

In none of these cases did the Court find rights in specific constitutional text: in each instance, it explored the limits of governmental authority inherent in the political structure established by the Framers. We ask no more.

These cases demonstrate, as well, that the Ninth Amendment analysis need not and should not be a license for judicial freewheeling reminiscent of *Lochner-era* substantive due process. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 527-28 (1967) (Stewart J., dissenting). Rather, it is a vehicle for preserving those values—and

only those values—that have been a part of the structure of our society since well before our nation's independence. The citizen's right to attend court and see justice done has been an attribute of Anglo-American law for over a thousand years. The failure to refer specifically to that right in the First or Sixth Amendment cannot be held to deny the right the constitutional stature it deserves. Surely nothing in the First or Sixth Amendment requires such a result; the Ninth Amendment and centuries of our jurisprudence forbid it.

III

THE CONSTITUTIONAL RIGHTS OF THE PUBLIC TO ATTEND JUDICIAL PROCEEDINGS CANNOT BE DENIED ABSENT A CLEAR AND PRESENT DANGER TO A DEFENDANT'S RIGHT TO A FAIR TRIAL AND A CLEAR SHOWING THAT LESS INTRUSIVE MEASURES WILL BE INEFFECTIVE IN PROTECTING THE DEFENDANT'S RIGHTS

The fundamental question which this Court must address is whether the First, Sixth and Ninth Amendments to the Constitution guarantee to the public a right of access to criminal trials. Because of the fundamental character of the rights asserted and their constitutional foundations, this Court should impose the highest standard of judicial protection for such rights. Nothing less than a showing of clear and present danger to a constitutional right of equal stature, a defendant's right to a fair trial, must be required prior to closing a criminal trial.

In *Gannett v. DePasquale, supra*, this Court clearly delineated cases involving access to criminal proceedings from cases wherein prior restraints on publication are

imposed. Recognizing this distinction, your amici respectfully submit that the immemorial right of the people to attend criminal trials deserves the same judicial protection as the right of the press to publish accurate information lawfully obtained.

The American Bar Association Task Force on Fair Trial and Free Press chaired by Judge Alfred T. Goodwin of the Ninth Circuit Court of Appeals, after eleven years of intensive study, has adopted, and the ABA House of Delegates has approved, the standards set forth in *Nebraska Press Ass'n. v. Stuart, supra*, with regard to closure of pretrial proceedings. See Appendix A (full text). Standard 8-3.2 states that closure may be ordered only if:

> (1) dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and,
>
> (2) the prejudicial effect of such information upon trial fairness cannot be avoided by any reasonable alternative means.

The *Commentary* on this Standard suggests the following specific alternatives: "(1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration of the jury, and (8) admonitory instructions to the jury."

In addition to the American Bar Association provisions cited above, your amici respectfully urge this Court to adopt a rule that would forbid closure of a criminal proceeding in the absence of an assessment of the probable efficacy of the action. In *Nebraska Press Ass'n. v. Stuart, supra*, Chief Justice Burger, writing for the majority, required such an assessment of the Court's order "as a workable method of protecting the defendant's right

to a fair trial prior to the setting aside of First Amendment rights." *Id.* at 565. In rejecting the efficacy of the gag order, Chief Justice Burger recognized the dangers inherent in the transmission of rumors where accurate reports of criminal trials are not available to the public:

> [G]iven the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts.

Id. at 567. Secret trials clearly give rise to a much greater degree of speculation. Under a gag order, such as the one in *Nebraska Press*, accurate oral reports may be disseminated by those in attendance. Under a closure order where only the parties are present, totally unfounded speculation concerning a conviction or acquittal is inevitable.

The importance of assessing the efficacy of any state action which inhibits a constitutional right was affirmed as recently as the last term of this Court in *Smith v. Daily Mail Publishing Co.*, ____U.S.____, 61 L.Ed.2d 399 (1979).

Justice Rhenquist addressed this issue in his concurring opinion:

> I believe that an obvious failure of a state statute to achieve its purpose is entitled to considerable weight in the balancing process that is employed in deciding issues arising under the First and Fourteenth Amendment protections accorded freedom of expression.

Id. at 409 n. 3.

Your amici respectfully urge this Court to clarify this area of the law by adopting the standards set forth in *Nebraska Press Ass'n. v. Stuart*, *supra*.

The majority opinion of this Court in *DePasquale*, while acknowledging that a defendant has no absolute right to compel a private trial, does not prescribe adequate standards against which, in the context of potentially

prejudicial pretrial publicity, a defendant's motion for closure must be weighed. Justice Stewart has correctly observed in *DePasquale*, that, with the possible exception of the right to assistance of counsel,[13] Sixth Amendment guarantees do not as a matter of law, confer on a criminal defendant the right to demand their opposites. 61 L.Ed.2d at 623. *See also, Singer v. United States*, 380 U.S. 24 (1965) (right to jury trial); *Barker v. Wingo*, 407 U.S. 514 (1972) (right to speedy trial). This principle is buttressed by the fact that, regardless of whether the public's right to attend judicial proceedings is of constitutional magnitude, "there is a strong society interest in public trials." *Gannett v. DePasquale*, *supra* at 623. Courts do not have unrestricted power to "suppress, edit, or censor events or publication thereon which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367 (1947).

> The law . . . favors publicity in legal proceedings so far as that object can be attained without injustice to the persons immediately concerned.

2 COOLEY, CONSTITUTIONAL LIMITATIONS 931-932 (Covington ed. 1927)

In holding that the television media do not have the right to overcrowd a courtroom with reporters, lighting and camera equipment so as to deny in a pretrial hearing the "judicial serenity and calm to which [a defendant is] entitled," *Estes v. Texas*, 381 U.S. 532 (1965), this Court observed:

> It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be . . .

Id. at 541.

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[13] See Faretta v. California 422 U.S. 806 (1975)

Thus, it becomes the defendant's burden to justify closure of presumptively open proceedings. See, *e.g.*, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 at 562, 569, 571; *Nebraska Press Ass'n. v. Stuart*, 423 U.S. 1327, 1333 (1975) (Blackmun, Circuit Justice, mem.). This burden requires the defendant to establish a causal relationship between the exercise of the right to attend open proceedings, and the substantive evil which the government is empowered to regulate (the unfair trial). This burden is necessarily heavy because, in the first place, "in the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important [Sixth Amendment] right." *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 at 551.

Of course, it cannot be denied that extremely inflammatory and prejudicial publicity may create "tensions ... between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment." *Id.* Yet, "cases such as these are relatively rare, and we have held that trials have been fair in spite of widespread publicity." *Id.* at 554.

The reason why "pretrial publicity—even pervasive, adverse publicity—does not [necessarily] lead to an unfair trial" is that "the capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity ..." *Nebraska Press Ass'n. v. Stuart*, *supra* at 554-55; see also, *Murphy v. Florida*, 421 U.S. 794 (1975).

Requiring that a defendant present some factual justification for conducting judicial proceedings in secret is made difficult, yet all the more appropriate, because any determination that conducting a trial or pretrial hearing in public will ultimately deny a defendant a trial before an impartial jury is "of necessity speculative, dealing...with factors unknown and unknowable." *Nebraska Press Ass'n.*

supra, at 563. *Accord*, *id.* at 599, 604 (Brennan, J., concurring). The court must speculate about the amount and nature of the evidence which will be publicly disclosed and its impact upon the veniremen. Lastly, the judge must consider whether the information suppressed through closure might leak out in any event, or perhaps "become available through rumors and gossip, whether or not the press is enjoined from [attending the proceeding]." *Nebraska Press Ass'n.*, *supra*, at 599, n. 22 (Brennan, J., concurring opinion).[14]

More importantly, the burden of establishing the need for closure must remain heavy because there are measures available to a trial court which can protect against impartial juror prejudice in ways much less damaging to the First Amendment and other societal policies served through public proceedings. "[M]embers of the press and public objecting to the exclusion have the right to demand that it extend no further than is likely to achieve these goals." *Gannett v. DePasquale*, *supra*, at 634 (Powell, J., concurring opinion).[15] This principle is in accord with the holdings in previous cases that First Amendment freedoms cannot be subordinated by one means, where alternative means less restrictive of First Amendment liberties, yet effective, are available. *See e.g.*, *Nebraska Press Ass'n. v. Stuart*, *supra*, at 562-565; *Gooding v. Wilson*, 405 U.S. 518, 522 (1973); *Carrol v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968);

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[14] "Indeed, the media in such situations could help dispel erroneous conceptions circulating among the populace." *Id.* at 599 fn.22 (Brennan, J., concurring opinion).

[15] "There can be no ducking of the problem of the press prejudging trials even if the occurrence is seldom and is almost solely confined to *causes celebres*. But the solutions that we seek must be appropriate to the difficulties, both to their nature and to their frequency. The question is not a matter of neglecting to find a remedy but to find one no more painful than the illness demands." A. FRIENDLY AND R. GOLDFARB, CRIME AND PUBLICITY, 71 (1967)

Cantwell v. Connecticut, 310 U.S. 296, 204 (1904); *Scott v. Scott*, (1913) A.C. 417, 438 (Vicount Haldane L.C.). (Before the Courts of England may be closed, those who would close them "must satisfy the Court that by nothing short of the exclusion of the public can justice be done.")

Your amici urge this Court to adopt the rule which the Constitution requires that a criminal proceeding may be closed to the public only where:

> (1) there is a strong showing that prejudicial publicity will create a clear and present danger to the fairness of the trial;
>
> (2) the prejudicial effect of such information cannot be avoided by alternative means; and
>
> (3) a strong showing is made that closure will accomplish its purpose of preventing jury prejudice.

CONCLUSION

It would indeed be a sad day in the history of our country's jurisprudence if the Commonwealth of Virginia, the birthplace of the Bill of Rights, should cause the loss of an immemorial right to open criminal proceedings in our society. Such open proceedings are, without doubt, an intregal part of the system of civil liberties envisioned by George Wythe, Patrick Henry, Thomas Jefferson, James Madison and other great patriots. We most respectfully urge that the Supreme Court of Virginia be found in error and that this Court reconsider its ruling in *DePasquale* so that, once and for all, no one will question the fact that open judicial proceedings must be maintained in a participatory government such as ours. Only in the most egregious circumstances should any judicial proceeding be closed to the public and under our republican form of democracy to the public's representative, the press.

Your amici appreciate this opportunity to have presented these views to this distinguished body and we await with great interest the resolution of these vital questions.

Respectfully submitted,

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APPENDIX A

AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE

Standard 8-3.2. Pretrial proceedings: exclusion of public and sealing of records

Except as provided below, pretrial proceedings and their record shall be open to the public, including representatives of the news media. If at the pretrial proceeding testimony or evidence is adduced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the inpaneling of the jury or until an earlier time consistent with the fair administration of justice. The presiding officer may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a motion to suppress, and may seal the record only if:

(i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and

(ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.

The defendant may move that all or part of the proceeding be closed to the public (including representatives of the news media), or, with the consent of the defendant, the presiding officer may take such action sua sponte or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial proceeding is held in chambers or otherwise closed to the public, a

complete record shall be kept and made available to the public following the completion of trial or earlier if consistent with trial fairness.

History of Standard

This is original standard 3.1. Several changes have been made; some are organizational or for clarification, while others are substantive. First, the standard governs both the closing of pretrial proceedings and the sealing of court records. Second, the standard establishes a clear-cut presumption in favor of the openness of pretrial proceedings and court records. As an alternative to either procedure, the standard encourages the development of voluntary agreements between the press and the courts concerning the publication of information which might affect the defendant's right to a fair trial. Finally, if a motion is made for closure of a pretrial proceeding or the sealing of court records, a two-part standard applies that combines the clear and present danger and least restrictive alternative tests. This standard is more rigorous than the test in original standard 3.1, which was based on the "substantial likelihood of interference" formulation.

Related Standards

None

Commentary

The policy underlying this standard is a strong presumption in favor of open judicial proceedings and free access to records in a criminal case. Although this standard deals only with pretrial proceedings, the general principle extends to every phase of judicial proceedings in a criminal case.

The sixth amendment speaks in terms of the right of the accused to a public trial,[1] but this right does not belong solely to the accused to assert or forgo as he or she desires.[2] Many courts have recognized that the public generally has an overlapping and compelling interest in public trials.[3] The defendant's interest, primarily, is to ensure fair treatment in his or her particular case. While the public's more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. The transcendent reason for public trials is to ensure efficiency, competence, and integrity in the overall operation of the judicial system.[4] Thus, the defendant's willingness to waive the right to a public trial in a criminal

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[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI *See In re Oliver*, 333 U.S. 257 (1948). The Supreme Court has also held that due process "demands appropriate regard for the requirements of a public proceeding in . . . all adjudications through the exercise of the judicial power." Levine v. United States, 362 U.S. 610, 616 (1962).

Although there is authority holding that preliminary proceedings are not within the meaning of the sixth amendment, Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), the great majority of courts have rejected that view. *See, e.g.*, United States v. Clark, 475 F.2d 240 (2d Cir. 1973); Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969) (en banc).

[2] United States v. Cianfroni, F.2d, 3 Med. L. Rptr. 1961, 1970-72 (March 16, 1978); United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949) (en banc); United States v. Lopez, 328 F.Supp. 1077, 1087 (E.D.N.Y. 1971); Commercial Printing Co. v. Lee, 553 S.W.2d 270 (Ark. 1977); Keene Publishing Co. v. Keene Dist. Court, 380 A.2d 261 (N.H. 1977); People v. Marino, 383 N.Y.S.2d 147 (Cty. Ct. 1976). *See also* Singer v. United States, 380 U.S. 24 (1965).

[3] *See* cases cited in note 2 *supra*.

[4] These themes are emphasized to varying degrees in all of the cases cited in note 2 *supra*. The theme of judicial integrity, however, has been a paramount concern to the Supreme Court, and the role of the press in promoting that value has been

(footnote continued on next page)

case cannot be the deciding factor. This holds true no matter how personally beneficial private proceedings in a criminal case might be to the defendant. It is just as important to the public to guard against undue harshness or discrimination.[5]

The role of the news media in this process is especially significant. Few individuals have the time or inclination to observe personally the operation of the criminal justice system. Representatives of the news media largely serve that function. It has been argued that the press has a first amendment right of access to the courts and court records that exceeds such rights of members of the public generally. This view has been rejected by the courts.[6]

The policy in this standard in favor of open proceedings and free access to court records rests on sixth amendment grounds. It is subject to important limitations. When there is a threat to the defendant's right to a fair trial, the trial judge is obligated to take steps to neutralize that threat. The first step in the process should be to seek a voluntary agreement with members of the news media about the timing and scope of coverage. It is undesirable to resolve such questions by litigation without first considering informal and less antagonistic measures. The use of voluntary fair trial/free press agreement is already a practice in many jurisdictions, and the trend should be

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consistently recognized. Landmark Communications, Inc. v. Virginia, 46 U.S.L.W. 4389, 4392-93 (May 1, 1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60, 606 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-96 (1975); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); *In re* Oliver, 333 U.S. 257, 270-71 (1948).

[5] *In re* Edens, 226 S.E.2d (N.C. 1976).

[6] Pell v. Procunier, 417 U.S. 817 834-35 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); United States v. Gurney, 558 F.2d 1202, 1208-09 (5th Cir. 1977); Garrett v. Estelle, 556 F.2d 1274, 1277-78 (5th Cir. 1977).

encouraged.[7] In any event, if a voluntary agreement is reached between representatives of the news media and the court, any delay in the publication of potentially prejudicial information should be only until the impaneling of the jury, and shorter if possible.

The principles embodied in standard 8-3.2 represent a significant departure from original standard 3.1. The substance of the standard, however, is the option of closing pretrial proceedings and sealing judicial records. Before pretrial proceedings can be closed or any record sealed, the two-part test of the standard must be met. The moving party must establish that: (1) a clear and present danger to the fairness of the trial would exist if the information were publicly disclosed, and (2) the prejudicial effect of such information on the fairness of the trial cannot be avoided by reasonable alternative means. The standard does not enumerate possible procedural alternatives, but the effectiveness of the following should receive serious consideration: (1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration of the jury, and (8) admonitory instructions to the jury.[8]

The public interest in open proceedings and free access to courts in a criminal case is at least as strong as the first amendment policy against prior restraints. Consequently, this standard follows the basic approach taken

[7] As of June 1974, twenty-three states adopted voluntary fair trial/free press guidelines. ABA, FAIR TRIAL/FREE PRESS VOLUNTARY AGREEMENTS (1974).

[8] The Supreme Court noted several of these measures in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-65 (1976). Others are enumerated in a report to the Senate Subcommittee on Constitutional Rights. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, FREE PRESS-FAIR TRIAL, 94th Cong., 2d Sess. 8-10 (1976).

by the Supreme Court in *Nebraska Press Association v. Stuart*.[9] Although developed in the context of a prior restraint case, that approach or its equivalent has been applied in the present context by a number of courts.[10] The question might legitimately be raised, however, why the *Nebraska Press Association* test is adopted in this standard but rejected in standard 8-3.1. The answer lies in the fact that there is a crucial difference between imposing prior restraints against the press on the one hand and the denial of access to news sources on the other. The administration of a system of prior restraints necessarily involves the courts in overseeing the press; the entanglement of the courts and the press results in unavoidable and perhaps unintended suppression of first amendment values no matter how carefully or conscientiously a court may draw the line between protected and unprotected speech.[11] There is less difficulty where closure of judicial proceedings and sealing of court records are at issue. Hence, case-by-case adjudication is acceptable under this standard, but not under standard 8-3.1.

The last paragraph in standard 8-3.2 requires that any motion to close a pretrial proceeding or seal court records be made with the consent of the defendant. The motion, however, cannot be granted unless the court affirmatively concludes that the requirements of the clear and present danger and least restrictive alternative tests have been met. The burden of proof is on the party making the motion. The standard thus clarifies the language of original standard 3.1 stating that the motion to

[9] 427 U.S. 539, 562-65 (1976).

[10] *See e.g.*, United States v. Cianfroni, F.2d, 3 Med. L. Rptr. 1961 (March 16, 1978); Keene Publishing Corp. v. Keene Dist. Court, 380 A.2d 261 (N.H. 1977); State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977).

[11] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 724-31 (1978).

close a pretrial hearing "shall be granted unless the presiding officer determines that there is no substantial likelihood"[12] of interference with the defendant's right to a fair trial by an impartial jury.

The last sentence in standard 8-3.2 provides that when a procedure is held in chambers or otherwise closed to the public, a complete transcript shall be kept and made available after the conclusion of the trial or disposition without trial. The purpose of this requirement is to provide a surrogate method of examining the conduct of closed proceedings. The transcript is the only possible substitute for the denial of access.

[12] ABA, FAIR TRIAL AND FREE PRESS 113 (1968).

Supreme Court, U. S.
FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,

Appellants,

—v.—

RICHARD H.C. TAYLOR,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AS *AMICI CURIAE*

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RICHARD H.C. TAYLOR,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AS AMICI CURIAE

Interest of Amici*

For 59 years, the American Civil

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* The parties have agreed to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of the Court.

Liberties Union and its state affiliates, including amicus ACLU of Virginia, have been dedicated to the protection of civil liberties through a vigorous defense of the safeguards embodied in the American Constitution.

The present case is of particular interest to the ACLU and the ACLU of Virginia because the decision of the Virginia Supreme Court threatens the continued vitality of one such safeguard - the public trial. Public trials have been an integral part of American society. They have played an indispensable role in our history as a check on the uses and abuses of the awesome power of the criminal law. In order to preserve this tradition of public trials, the ACLU and the New York Civil Liberties Union participated as amici curiae urging reconsideration and reversal of the decision in Gannett v. DePasquale, 61 L.Ed. 2d 608 (1979), and the ACLU and the ACLU of Virginia urged the Court to hear the instant case on the merits in an amicus brief filed in support of the jurisdictional statement - a step rarely taken by the ACLU.

Insofar as this case is perceived as an opportunity to accomodate public and

individual rights, the ACLU's brief supporting the rights of the defendant to a verdict untainted by prejudicial publicity, Sheppard v. Maxwell, 384 U.S. 333 (1966), for example, and its brief urging the invalidity of a prior restraint in the context of an ongoing criminal proceeding, Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), place amici in a unique position to aid the Court in striking an appropriate balance.

STATEMENT OF THE CASE

The facts of the case appear undisputed. On or about September 11, 1978, the appellee, Honorable Richard H. C. Taylor, granted defendant's motion to exclude the public and the press from his fourth trial for an alleged murder. In support of the motion, defense counsel asserted that closure was necessary to prevent "any information being shuffled back and forth when we have a recess as to what-who testified to what." Appellants' Brief in Support of the Jurisdictional Statement, App. D. at 7a. The prosecutor acquiesced, noting that the matter was within the judge's discretion.

Pursuant to Virginia Code §19.2-266, which provides that the court may "in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial. . .," the trial judge closed the entire trial to everyone (including appellants Wheeler and McCarthy, two reporters of appellant Richmond Newspapers), except testifying witnesses.

No factual determination was made concerning (1) the extent of the threat, if any, posed to defendant's fair trial rights by the presence of the press and public, (2) the existence of any previous or potentially prejudicial pre-trial publicity, or (3) the availability of less drastic alternatives to protect the rights of the defendant.

Upon the request of counsel for appellants, the court scheduled a hearing on its closure order. Appellants argued that the First, Sixth, and Fourteenth Amendments required the trial to be open, and that the court had to utilize other available measures, short of closure, to protect defendant's rights. The defense attorney reiterated his concerns about "leaks" and attempted to

justify closure as the only available option.

At the conclusion of the arguments, the trial judge, commenting that "having people in the Courtroom is distracting to the jury," continued his closure order. Appellants' Brief at App. E at 9a. The trial ended two days later. A one-page order was entered sustaining the defendant's motion to strike the government's evidence "on the grounds stated in the record." The court found the defendant "not guilty of murder, as charged in the indictment," and released him. Id. at App. N.

On appeal, the Virginia Supreme Court affirmed the closure order, citing only Gannett v. DePasquale, 61 L.Ed.2d 608 (1979), as authority for closure.

SUMMARY OF ARGUMENT

Gannett v. DePasquale, 61 L.Ed.2d 608 (1979) (hereafter, "Gannett"), should be overruled or expressly limited to its facts, which involved only closure of pre-trial suppression proceedings upon the consent of both parties. Point I.

Whether the source of the right is the First Amendment, the Sixth Amendment, or the

"four corners of the Constitution itself," the Court should expressly acknowledge that the public and the press have a constitutionally protected right of access to criminal trials and pre-trial proceedings. Point I.A.

Like most constitutional rights, that right is not absolute. But it can be limited only if necessary to protect a competing constitutional right of a defendant, or, perhaps, if necessary to further a compelling governmental interest in the administration of justice.

Gannett should not be extended to authorize closure of criminal trials. Point I.B. It should be limited to its facts, which involved only pre-trial suppression proceedings. Point I.B.1. Public access to trials poses substantially fewer risks to defendant's constitutional rights than does access to pre-trial suppression proceedings. Point I.B.2. And there are many alternatives to closure that can be utilized during trial to protect a defendant's constitutional rights. Point I.B.3.

Finally, even if the public does not

have a constitutionally protected right of access, a defendant should not ordinarily be able to waive a public trial without the express consent of the prosecutor. Point II.

Public and press access to criminal trials and proceedings should therefore be presumed. This presumption may only be overcome by a finding of the trial court, upon adequate evidence, that the defendant has carried his burden of proving closure is necessary because there is a "substantial probability that irreparable damage to his fair trial will result from an open procedure," that alternatives to closure will not protect his constitutional rights, and that closure will be effective.

Those findings were not made in this case. Accordingly, the judgment below should be reversed.

I. GANNETT SHOULD BE OVERRULED OR EXPRESSLY LIMITED TO ITS FACTS, WHICH INVOLVED ONLY CLOSURE OF PRE-TRIAL SUPPRESSION PROCEEDINGS, UPON THE CONSENT OF BOTH PARTIES.

"A trial is a public event. What transpires in the courtroom is public property." Craig v. Harney, 331, U.S. 367 at 374 (1947). That statement reflects a 200-year-old tradition supporting public trials as fundamental to the fair and efficient administration of justice and to the effective operation of a democratic society. However, in the five months since this Court decided Gannett, there has been widespread (although understandable) uncertainty as to the continuing vitality of that tradition. As a consequence of this uncertainty, courts have interpreted Gannett to sanction closure of almost every step in the criminal justice process, from arraignment, through jury voir dire, to post-conviction hearings;

and several courts, including the Virginia Supreme Court below, have interpreted Gannett as authorizing closure of the entire criminal trial.[1/]

A. The Public and the Press Have a Constitutionally Protected Right of Access to Criminal Pre-Trial and Trial Proceedings.

Gannett has been widely understood as holding that the public and the press do not have any constitutionally protected right of access to criminal pre-trial proceedings. That is not what the Court held. Although five justices found that the Sixth Amendment does not protect such public access, neither the majority nor the dissent foreclosed the possibility that the First Amendment protects such public access - a question which both the majority and the dissent expressly left open.[2/] Actually, although

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1/ See Brief of Reporter's Committee For Freedom of the Press in Support of Jurisdictional Statement, Amicus Curiae, and Appendices.

2/ 61 L.Ed.2d at 629, 664.

they did not agree upon the source of the right, five justices expressly found that the public and the press have a constitutionally protected right of access even to pre-trial suppression hearings. Justice Powell, concurring, found the source of that right in the First Amendment.[3/] Justice Blackmun, with Justices Brennan, White, and Marshall concurring in his dissent, found the source of that right in the

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3/ Justice Powell stated: "Although I join the opinion of the Court, I would address the question that it reserves. Because of the importance of the public's having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pre-trial suppression hearing. As I have argued in Saxbe v. Washington Post Co. [citations omitted], this constitutional protection derives not from any special status of members of the press, but rather because ' [i]n seeking out the news the press...acts as an agent of the public-at-large,...'" 61 L.Ed.2d at 632 (ellipsis in original).

Sixth Amendment.[4/] It follows, a fortiori, that the public and the press have a constitutionally protected right of access to criminal trials.[5/]

The Court, on prior occasions, has acknowledged the existence of constitutionally protected rights that are not expressly mentioned in the Constitution, or whose specific source was unsettled. For example, this Court recognized a right not to be convicted without proof beyond a reasonable doubt, Mullaney v. Wilbur, 421 U.S. 684 (1975), and In Re Winship, 397 U.S. 358 (1970); a right of privacy,

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4/ Justice Blackmun stated: "I therefore conclude that the Due Process Clause of the Fourteenth Amendment, insofar as it incorporates the public trial provision of the Sixth Amendment, prohibits the States from excluding the public from a proceeding within the ambit of the Sixth Amendment's guarantee. . ." 61 L.Ed.2d at 655.

5/ Although this case involves only closure of the trial, amici contend that the public right of access extends to all phases of criminal proceedings traditionally open to the public.

Griswold v. Connecticut, 381 U.S. 479 (1965); a right to vote in state elections, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); and a right to travel interstate, United States v. Guest, 383 U.S. 745 (1966).

The Guest case is illustrative. Six defendants were indicted for criminal conspiracy to deprive black citizens of the free exercise and enjoyment of several specified rights secured by the Federal Constitution, including a conspiracy to deprive black citizens of "the right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." 383 U.S. at 757. The district court dismissed this count for failure to state an offense against rights secured by the Constitution.

This Court reversed. In reviewing the possible constitutional sources of a right to travel, the Court found that: "although the Articles of Confederation provided that 'the people of each State shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution." Id. at 758. Suggested sources of the right were the Privileges and

Immunities Clause of the Fourteenth Amendment, Corfield v. Coryell, 4 Wash. CC 371 (1825), the Commerce Clause, Edwards v. California, 314 U.S. 160 (1941), and the Due Process Clause of the Fifth Amendment, Kent v. Dulles, 357 U.S. 116 (1958). Nevertheless, the Court acknowledged the existence of a constitutionally protected right to travel despite the "recurring differences within this Court as to [its] source. . . ." Id. at 759. The fact that "all have agreed that the right exists" was deemed sufficient to acknowledge the right, apparently even if there were no agreement among a majority of the Court concerning the specific source of the right. Id.

As noted, in Gannett Justices Blackmun, Brennan, White, and Marshall agreed that the Sixth Amendment protects public and press access even to pre-trial suppression proceedings. Justice Powell, concurring, found that right protected by the First Amendment. And given Justice Stevens' views in Houchins v. KQED, 438 U.S. 1 (1978),[6/] where he found a First

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6/ Justice Stevens, with whom Justices Brennan and Powell joined, stated that the First Amendment protects not only the dis-
(FN 6 continued on next page)

Amendment right of access to county jails, it is reasonable to conclude he would find that public and press access to criminal trials is presumptively protected by the First Amendment. Thus, although there is disagreement about its source, at least six Justices agree that public and press access to criminal pre-trial and trial proceedings

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semination but also the receipt of information and ideas. "Without some protection for the acquisition of information about the operation of public institutions. . . by the public-at-large, the process of self-governance contemplated by the Framers would be stripped of its substance [and] [f]or that reason information gathering is entitled to some measure of constitutional protection." Houchins at 32. Under this analysis, access to the courtroom must be considered a correlative right to the right of the public to receive information. Amici do not contend that this correlative right requires recognition of a special privilege to the public to have access to places which have traditionally been closed, or that the right of public access to information is unqualified. But where governmental functions have traditionally been conducted in public or are public by their very nature, those functions should be considered presumptively open to the public.

is presumptively protected by the Constitution.

Accordingly, amici believe that, properly understood, Gannett did not preclude a constitutionally protected right of public and press access even to pre-trial suppression hearings. But even if we are wrong, there are strong reasons opposing the extention of Gannett's pre-trial ruling to preclude a constitutionally protected right of public and press access to criminal trials.

B. Gannett Should Not Be Extended to Authorize Closure of Criminal Trials.

Although the facts of Gannett involved only a pre-trial suppression hearing, and although the majority opinion began by phrasing the issue to be decided as whether members of the public have an independent constitutional right to insist upon access to a pre-trial proceeding," (61 L. Ed.2d at 616), the concluding language in the majority opinion is much broader: "[W]e hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." Id. at 628 (emphasis added).

It is therefore appropriate that the actual holding in Gannett be clarified.

1. Gannett should be limited to its facts.

Decisions are traditionally clarified by the case-by-case method of limiting every holding to its particular facts, with all language not necessary to the resolution of the narrow issue posed by those facts considered dicta. See Harris v. New York, 401

U.S. 222, 224 (1971).[7]

The facts material and necessary to the Gannett decision, and in whose absence Gannett should not be deemed controlling, were as follows:

(a) Gannett involved a pre-trial motion to suppress an allegedly involuntary confession and certain physical evidence. The distinctions between pre-trial suppression hearings and trial or post-trial proceedings are not simply technical distinctions, but substantive differences.[8]

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7. In Harris, this Court, in holding that statements obtained in violation of Miranda v. Arizona may be used for impeachment purposes, found the Miranda language ("statements...used to impeach testimony...are incriminating and may not be used without full warnings and effective waiver") to be unnecessary to the Miranda decision, and therefore not controlling. Harris v. New York, 401 U.S. at 224.

8. The majority in Gannett emphasized the "special risks" posed by pre-trial suppression hearings, whose "whole purpose...is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury." 61 L.Ed.2d at 620.

For example, there are many alternatives less drastic than closure that are available during a trial, including sequestration of the jury (see discussion infra), that are not available in pre-trial proceedings. And pre-trial proceedings, other than suppression hearings, pose substantially less risk to a defendant's constitutional rights because public knowledge of the contents of those proceedings is far less likely to prejudice prospective jurors. Thus, arraignments, most bail proceedings, and determinations of a defendant's mental competence to stand trial are qualitatively different from pre-trial motions to suppress evidence.[9/]

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9. Indeed, the same New York State Court of Appeals which authorized closure in Gannett subsequently limited Gannett to pre-trial suppression proceedings, and ruled unanimously that determinations of competence to stand trial should be open to the public and the press. Westchester Rockland Newspapers, Inc. v. Leggett, 99 N.Y.L.J. 1 (Nov. 23, 1979).

(b) The trial court in Gannett found on the record that an open hearing would pose a "reasonable probability of prejudice to these defendants." 61 L.Ed. 2d at 629. It was probable that the press would provide extensive coverage of the suppression hearing and that the coverage would reach a substantial percentage of potential jurors. The majority in Gannett thought it important to describe at length the extent of the previous publicity about the case (id. at 616-619), and to note defense counsel's contention that "the unabated buildup of adverse publicity" had already "jeopardized the ability of the defendants to receive a fair trial." Id. at 619. The majority apparently thought the trial judge could reasonably conclude that a substantial number of potential jurors, whose interest in the case had been whetted by previous publicity, would read any press coverage of the suppression hearing, and that such a hearing would generate inadmissible and highly prejudicial information about alleged confessions and defendants' possession of the alleged murder weapon. Thus, Gannett involved a judicial finding of probable prejudice to

a defendant, and that finding was based on adequate evidence.

(c) The Gannett majority stressed repeatedly that the defendant had requested closure, and the prosecutor had consented. Id. at 619, 630. Justice Powell, concurring, also noted that the prosecutor "had endorsed the closure motion." Id. at 635. Thus, Gannett is not authority for closure over the objection of the prosecutor.[10/]

(d) Finally, the majority in Gannett stressed that no member of the public or the press had made "a contemporaneous objection" to closure. Id. at 629. And Justice Powell, concurring, emphasized the strong practical

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10. It is conceivable, though unlikely (see Point II, infra), that a court could properly order closure over a prosecutor's objection if closure were deemed necessary to protect defendant's constitutional rights, but the objection of a prosecutor would almost always preclude closure on any other ground. If the prosecutor does not believe closure is necessary to further a compelling governmental interest, such as protecting the identity of a confidential informer, it is unlikely that a finding of necessity for closure would be justified.

reasons requiring a "timely objection" by persons "actually present at the time the motion for closure is made...." Id. at 634-5.

Thus, properly understood, Gannett held only that the public and the press can be excluded from a pre-trial suppression hearing when the trial judge finds, upon adequate evidence, that closure is necessary to prevent a reasonable probability of prejudice to a defendant's constitutional rights, when the defendant and the prosecutor consent to closure, and when there is no contemporaneous objection to closure by the public or the press. Closure in any other circumstances, as in the instant case, would constitute an unwarranted extension of the holding in Gannett.

2. Access to trials poses substantially fewer risks to defendant's constitutional rights than does access to pre-trial suppression hearings.

It is very unlikely that it could be considered unduly prejudicial to a defendant for a juror to read a newspaper summary of legally admissible evidence which

was heard in open court. Nor can it be deemed unduly prejudicial for the press to summarize inadmissible evidence which the jury heard, but was instructed to disregard.[11/] Generally, prejudicial evidence that is not admissible will have been screened out at pre-trial suppression hearings, and will not be presented in open court. Thus trials do not pose the "special risks" posed by pre-trial suppression hearings.

Of course, during a trial, the press could always report potentially prejudicial information it has itself obtained independently. But that kind of potentially prejudicial information does not result from public trials, and would not be prevented by closure.

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11. It is unlikely, though arguable, that repeated exposure to the inadmissible evidence would unduly prejudice the jury even if the initial exposure did not. But even that possibility could be avoided by implementation of alternatives, including sequestration and voir dire. Ordinarily, of course, jurors are instructed at the beginning of a trial not to read anything about the trial until after they announce their verdict. If that routine instruction is obeyed, as it usually is, press coverage of the trial could not prejudice the jury.

Realistically, the only trial situation in which a defendant is likely to be unduly prejudiced is when the press summarizes evidence or argument presented in open court when the jury was not present. That risk, though small, can be eliminated or minimized by alternatives less drastic than closure.[12/]

3. During trials, judges have available many alternatives for protecting defendant's rights that are less drastic than closure of the entire trial.

The four justices who dissented in Gannett expressly placed on the defendant the burden of showing "a substantial probability that alternatives to closure will not protect adequately his right to a fair trial." 61 L.Ed.2d at 660. Justice Powell, concurring, agreed that the trial court should consider alternatives to closure, but placed on the public and the press the responsibility of showing

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12. See note 11, supra. In addition, most of this kind of evidence or argument is, or can be, presented to the judge in chambers, or at a "bench conference."

to the court's satisfaction that "alternative procedures" are available that would eliminate prejudice to the defendant. Id. at 635. Amici believe the burden should be on the parties requesting closure; but regardless of where the burden is placed, at least five justices agree that closure is not constitutionally permissible if less drastic alternatives would protect the defendant's constitutional rights.[13/]

Many alternatives are available to trial and appellate courts to protect a defendant's right to a fair trial.[14/] Because some of the alternatives interfere, though to a lesser extent than closure of the entire trial, with the presumptively protected right of access, they should not routinely be employed. With that caution in mind, amici list here some of the less drastic alternatives that this and lower courts have utilized:

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13. In the analogous context of "gag orders" on the press, at least four justices, and possibly five, agreed that gag orders would not be constitutionally permissible if less drastic alternatives would suffice. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

14. See generally, Fenner and Skoley, "Rights of the Press and the Closed Court Criminal Proceeding," 57 Neb.L.Rev. 442, 493-515 (1978).

1. sequestration of jurors, Nebraska Press, 427 U.S. 539 at 564 (1976);
2. voir dire of jurors, Murphy v. Florida, 421 U.S. 794, 800-03 (1975);
3. change of venire, United States v. Holovachka, 314 F.2d 345 (7th Cir.), cert. denied, 374 U.S. 809 (1963);
4. change of venue, Irvin v. Dowd, 366 U.S. 717, 721 (1961);
5. enforcement of courtroom decorum, Sheppard v. Maxwell, 384 U.S. 333, 358 (1966);
6. instructions to the jury (including opening instructions not to read any press coverage, and closing instructions to disregard any inadvertently acquired information), Sheppard v. Maxwell, supra at 357-58;
7. control over courtroom personnel and officers of the court, Sheppard v. Maxwell, supra at 359;
8. limited closure to protect the identity of minors or other witnesses, e.g., Geise v. United States, 262 F.2d 151 (9th Cir. 1958);

9. mistrial, new trial, and reversal. See generally, Rules 29, 33, 47 and 48, Fed.R.Crim.Pro.

Those alternatives were not considered in this case. Accordingly, the narrow pre-trial holding in Gannett should not be extended herein to sanction the closure of the entire criminal trial.

II. EVEN ABSENT A CONSTITUTIONAL RIGHT OF PUBLIC ACCESS, THE PUBLIC HAS A SUFFICIENT INTEREST IN OPEN TRIALS TO REQUIRE THE EXPRESS CONSENT OF THE PROSECUTOR TO A CLOSURE MOTION.

Public scrutiny and discussion of judicial proceedings has always been considered a fundamental safeguard of the American criminal justice system. See, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). Only by attending trials can the public receive that firsthand information regarding the workings of the criminal justice system necessary to appreciate and evaluate the performance of officials entrusted to administer justice, and necessary to protect the strong societal interest in fair and just proceedings. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975). Even the majority in Gannett recognized the strong public interest in open trials:

> There can be no blinking the fact that there is strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come

> forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. (citations omitted.) 61 L.Ed.2d at 623.

The majority in Gannett explicitly compared the strong public interest in the public trial clause of the Sixth Amendment with the strong public interest in the jury trial clause of the Sixth Amendment, and noted that there is "great public interest in jury trials as the preferred mode of fact-finding in criminal cases...." Id. at 624.

Although the "public interest" in jury trials has not yet been held to confer a "constitutional right" in the public to insist upon jury trials, this Court has found that public interest to be sufficiently strong to preclude a defendant's attempt to waive his constitutional right to a jury trial unless the prosecutor, as the representative of the public, consents:

> "In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation...Thus,...a defendant cannot waive a jury trial without the consent of the prosecutor...."

Id. at 624.[15] (citations omitted.) The public interest in open trials is no less strong than that in jury trials, and warrants similar protection.

The criminal prosecutor is not an ordinary party to a controversy, Singer v. United States, 380 U.S. 24 at 37 (1965). Although the prosecutor is the representative of the public interest, he or she must sometimes balance the public interest with potentially conflicting professional, personal, or political interests.[16] Thus, in the balancing process, the public interest may not always receive the protection it requires. In Gannett, as in the instant case, the balance resulted in prosecutorial acquiescence to the closure motion.[17] Such

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15. In some states the public has elected, by statute, to eliminate any prosecutorial role in the decision to waive jury trial. E.g., New York Criminal Procedure Law §§ 320.10 and 340.40 (McKinney, 1971).

16. This is not to assume that prosecutors would acquiesce for an "ignoble purpose." Singer v. United States, 380 U.S. at 37.

17. In Gannett, the "district attorney did not oppose the motion." 61 L.Ed.2d at 619. In Richmond Newspapers, "the prosecutor
(FN 17 continued on next page)

non-objection would be deemed insufficient to waive the public's interest in jury trials; it should similarly be deemed insufficient to waive the public's interest in open trials.

Thus, even if the public and the press do not have a constitutional right of access to criminal trials and pre-trial proceedings, a defendant should not be able to waive his or her constitutional right to a public trial without the prosecutor's express consent.[18/]

---

interposed no objection, emphasizing that '[i]t's strictly on defense motion,...in the discretion of the Court.'" Jurisdictional Statement at 7 and App.D. at 7a.

18. Although the "public trial" clause of the Sixth Amendment does not, of itself, empower a defendant to compel a closed trial over a prosecutor's objection, in very rare circumstances, the defendant's constitutional right to a "fair trial" may empower a defendant to compel a closed trial, even over a prosecutor's objection, if the court finds closure is necessary to protect the defendant's right to a fair trial and less drastic alternatives will not suffice.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Virginia Supreme Court and should overrule Gannett v. DePasquale, or limit it to its facts.

Respectfully submitted,

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*We wish to express our appreciation to law students Alyse Gray and Karen van Ingen, for their assistance in the preparation of this brief.

Supreme Court, U. S.
FILED
NOV 21 1979
MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN MCCARTHY,
Appellants,
v.
COMMONWEALTH OF VIRGINIA and RICHARD H.C. TAYLOR,
Appellees.

On Appeal from the Supreme Court of Virginia

BRIEF OF THE WASHINGTON POST, AMERICAN BROADCASTING COMPANIES, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK DAILY NEWS, THE WALL STREET JOURNAL, THE LOS ANGELES TIMES, THE CHICAGO SUN-TIMES, THE DETROIT NEWS, THE SAN FRANCISCO CHRONICLE, NEWSDAY, THE BOSTON GLOBE, THE PHILADELPHIA INQUIRER, THE KANSAS CITY TIMES, THE KANSAS CITY STAR, THE HOUSTON POST, BUFFALO

[Continued on Inside Cover]

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v.

COMMONWEALTH OF VIRGINIA and RICHARD H.C. TAYLOR,

Appellees.

On Appeal from the Supreme Court of Virginia

BRIEF OF THE WASHINGTON POST, AMERICAN BROADCASTING COMPANIES, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK DAILY NEWS, THE WALL STREET JOURNAL, THE LOS ANGELES TIMES, THE CHICAGO SUN-TIMES, THE DETROIT NEWS, THE SAN FRANCISCO CHRONICLE, NEWSDAY, THE BOSTON GLOBE, THE PHILADELPHIA INQUIRER, THE KANSAS CITY TIMES, THE KANSAS CITY STAR, THE HOUSTON POST, BUFFALO EVENING NEWS, THE MINNEAPOLIS STAR, MINNEAPOLIS TRIBUNE, THE DES MOINES REGISTER, DES MOINES TRIBUNE, THE ATLANTA JOURNAL, THE ATLANTA CONSTITUTION, THE (LOUISVILLE) COURIER-JOURNAL, THE LOUISVILLE TIMES, THE SAN DIEGO UNION, THE (SAN DIEGO) EVENING TRIBUNE, THE

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Fifty-six newspapers and three television networks submit this brief as *amici curiae* in support of appellants' claim that three final judgments of the Supreme Court of Virginia, entered on July 9, 1979, should be reversed. All parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk.

OPINIONS BELOW

The opinions of the Supreme Court of Virginia refusing appellants' petition for appeal, dismissing appellants' petition for a writ of mandamus and dismissing appellants' petition for a writ of prohibition, dated July 9, 1979, are set forth in the Appendix to the Jurisdictional Statement (hereinafter "J.S. App.") at 1a, 2a and 3a, and are unreported.

JURISDICTION

This is a consolidated appeal from three final judgments of the Supreme Court of Virginia, issued on July 9, 1979, denying appellants, Richmond Newspapers, Inc. and two of its reporters, relief from an order of the Circuit Court of Hanover County banning the public and the press from a two-day criminal trial held on September 11 and 12, 1978.

A Jurisdictional Statement was timely filed with this Court on August 14, 1979, invoking this Court's jurisdiction under 28 U.S.C. § 1257(2).

On October 9, 1979 this Court issued an order postponing consideration of the question of jurisdiction until a hearing on the merits.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

---

[1] For the reasons stated in the Reply Brief of Appellants to Appellees' Motion to Dismiss, *amici* submit that this Court has jurisdiction over the final judgments in this case pursuant to 28 U.S.C. § 1257(2). In any event, in light of the importance of the questions presented, the Court should at a minimum treat the appeal papers as a petition for certiorari, see 28 U.S.C. § 2103, and grant that petition pursuant to 28 U.S.C. § 1257(3). See, *e.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 434-35 (1959).

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

The text of Virginia Code § 19.2-266 is as follows:

> "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.
>
> "A court shall not permit the taking of photographs in the courtroom during the progress of judicial proceedings or the broadcasting of judicial proceedings by radio or television."

QUESTIONS PRESENTED

1. Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as construed to authorize the total exclusion of the press and the public from an entire criminal trial.

2. Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as construed to give trial judges unfettered discretion to close an entire criminal trial to the press and the public.

3. Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as enforced to expel the press and the public from an entire criminal trial, where

   (a) there is no showing or finding that public observation of the proceedings would substantially impair the fair trial of the accused, or endanger any other compelling or even significant interest; and

   (b) there is no showing or finding that procedures less drastic than secret trial—such as sequestering the jury—are unavailable or are inadequate to protect the interests said to be involved; and

   (c) there is no showing or finding that banishing the press and the public from the trial would effectively protect those interests; and

   (d) there is no showing or finding that those interests are of sufficient magnitude and are endangered to such a degree as to outweigh the constitutional rights of the press and the public.

INTEREST OF THE AMICI

Amici are fifty-six newspapers of general circulation and three broadcasting networks. They frequently report to the public on the affairs of government, including matters involving the judiciary. *Amici* represent a broad spectrum of the American newspaper publishing and broadcasting industry. They are located in cities and towns in states as diverse as New York, Nebraska, Texas, California and Virginia, among others. They are diverse in size—their newspapers have circulations ranging from over one million daily to under 2,000 weekly, and the three broadcasting companies have in excess of 30 million viewers for their nightly news programs.

The Washington Post is a newspaper published in Washington, D.C. with a daily circulation of 559,371.

American Broadcasting Companies, Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

National Broadcasting Company, Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

The New York Daily News is a newspaper published in New York, New York with a daily circulation of 1,824,836.

The Wall Street Journal is a newspaper published in New York, New York with a daily circulation of 1,750,000.

The Los Angeles Times is a newspaper published in Los Angeles, California with a daily circulation of 1,108,490.

The Chicago Sun-Times is a newspaper published in Chicago, Illinois with a daily circulation of 683,573.

The Detroit News is a newspaper published in Detroit, Michigan with a daily circulation of 631,836.

The San Francisco Chronicle is a newspaper published in San Francisco, California with a daily circulation of 504,644.

Newsday is a newspaper published on Long Island, New York with a daily circulation of 497,759.

The Boston Globe is a newspaper published in Boston, Massachusetts with a daily circulation of 480,752.

The Philadelphia Inquirer is a newspaper published in Philadelphia, Pennsylvania with a daily circulation of 419,497.

The Kansas City Times is a newspaper published in Kansas City, Missouri with a daily circulation of 315,589. *The Kansas City Star* is a newspaper published in Kansas City, Missouri with a daily circulation of 286,032.

The Houston Post is a newspaper published in Houston, Texas with a daily circulation of 299,546.

Buffalo Evening News is a newspaper published in Buffalo, New York with a daily circulation of 266,260.

The Minneapolis Star is a newspaper published in Minneapolis, Minnesota with a daily circulation of 226,899. *Minneapolis Tribune* is a newspaper published in Minneapolis, Minnesota with a daily circulation of 226,828.

The Des Moines Register is a newspaper published in Des Moines, Iowa with a daily circulation of 217,584. *Des Moines Tribune* is a newspaper published in Des Moines, Iowa with a daily circulation of 87,697.

The Atlanta Journal is a newspaper published in Atlanta, Georgia with a daily circulation of 217,450. *The Atlanta Constitution* is a newspaper published in Atlanta, Georgia with a daily circulation of 216,002.

The Courier-Journal is a newspaper published in Louisville, Kentucky with a daily circulation of 199,713. *The Louisville Times* is a newspaper published in Louisville, Kentucky with a daily circulation of 157,638.

The San Diego Union is a newspaper published in San Diego, California with a daily circulation of 198,334. *The Evening Tribune* is a newspaper published in San Diego, California with a daily circulation of 130,148.

The Sacramento Bee is a newspaper published in Sacramento, California with a daily circulation of 186,454.

The Sun is a newspaper published in Baltimore, Maryland with a daily circulation of 174,784. *The Evening Sun* is a newspaper published in Baltimore, Maryland with a daily circulation of 172,145.

The Florida Times Union is a newspaper published in Jacksonville, Florida with a daily circulation of 154,943. *Jacksonville Journal* is a newspaper published in Jacksonville, Florida with a daily circulation of 49,584.

Wichita Eagle is a newspaper published in Wichita, Kansas with a daily circulation of 121,849. *Wichita Beacon* is a newspaper published in Wichita, Kansas with a daily circulation of 41,540.

The Salt Lake Tribune is a newspaper published in Salt Lake City, Utah with a daily circulation of 106,459.

The Morning Call is a newspaper published in Allentown, Pennsylvania with a daily circulation of 102,556. *Evening Chronicle* is a newspaper published in Allentown, Pennsylvania with a daily circulation of 22,466.

The Albany Times-Union is a newspaper published in Albany, New York with a daily circulation of 85,174. *The Knickerbocker News* is a newspaper published in Albany, New York with a daily circulation of 57,093.

The Wisconsin State Journal is a newspaper published in Madison, Wisconsin with a daily circulation of 73,413. *The Capitol Times* is a newspaper published in Madison, Wisconsin with a daily circulation of 34,581.

The Press is a newspaper published in Riverside, California with a daily circulation of 35,826. *The Enterprise* is a newspaper published in Riverside, California with a daily circulation of 62,471.

St. Joseph Gazette is a newspaper published in St. Joseph, Missouri with a daily circulation of 44,640. *St. Joseph News-Press* is a newspaper published in St. Joseph, Missouri with a daily circulation of 51,271.

The Decatur Herald is a newspaper published in Decatur, Illinois with a daily circulation of 37,396. *Decatur Daily Review* is a newspaper published in Decatur, Illinois with a daily circulation of 27,685.

Jackson Sun is a newspaper published in Jackson, Tennessee with a daily circulation of 32,226.

The Anniston Star is a newspaper published in Anniston, Alabama with a daily circulation of 31,075.

Anchorage Daily News is a newspaper published in Anchorage, Alaska with a daily circulation of 29,713.

The Free Lance-Star is a newspaper published in Fredericksburg, Virginia with a daily circulation of 27,118.

Waukesha Freeman is a newspaper published in Waukesha, Wisconsin with a daily circulation of 25,080.

The Bulletin is a newspaper published in Bend, Oregon with a daily circulation of 18,812.

Chippewa Herald-Telegram is a newspaper published in Chippewa Falls, Wisconsin with a daily circulation of 9,220.

The Greenwood Commonwealth is a newspaper published in Greenwood, Mississippi with a daily circulation of 8,854.

The *Omaha Sun* newspapers are published in Omaha, Nebraska with a weekly circulation of 100,700.

The *Record* is a newspaper published in Havre de Grace, Maryland with a weekly circulation of 6,031.

Grinnell Herald-Register is a newspaper published in Grinnell, Iowa with a weekly circulation of 4,126.

Homer News is a newspaper published in Homer, Alaska with a weekly circulation of 1,800.

STATEMENT OF THE CASE

John Paul Stevenson's trial for second degree murder began on September 11, 1978 in the Hanover County (Virginia) Circuit Court.[2] At the start of the trial, defense counsel moved to exclude the public and the press from the courtroom for the duration of the trial, "because I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what." J.S. App. at 7a. The Commonwealth's Attorney did not object to the motion and stressed that the matter was "in the discretion of the Court." *Id.* The Court, noting that "the [closure] statute gives me the power specifically," *id.*, ordered "that the courtroom be kept clear of all parties except the witnesses when they testify." J.S. App. at 8a. The Court's ruling was made

[2] This was his fourth trial. His first trial ended in conviction on the charge, but the verdict was later reversed and the case remanded because prejudicial evidence had been improperly introduced at the trial. The next two trials ended in mistrials.

without conducting any factual inquiry or making any finding of necessity. All members of the public, including appellants, reporters Wheeler and McCarthy, were ordered from the courtroom. The remainder of the trial was conducted in secret.

Counsel for appellants sought a hearing on a motion to vacate the Court's order and to reopen the trial. When this hearing was held at the end of the day's proceedings, appellants were again ordered from the courtroom. No reason for the exclusion of the reporters was given.

Counsel for appellants argued that the closure order was violative of the reporters' First, Sixth and Fourteenth Amendment rights, and contended that there had been no showing that a fair trial would be jeopardized by the presence of members of the press and public. Appellants' counsel pointed out that other remedies, such as sequestration of the jury or change of venue, had not been exhausted or shown to be insufficient to ensure the rights of the defendant.

Defense counsel referred to "difficulty . . . with information . . . between the jurors," J.S. App. at 15a, and to his fear that news of the trial might reach the jury through the press in this "small community." *Ibid.* He insisted that the defendant's right to a fair and impartial trial "supersede[d] all other rights." *Ibid.*

After hearing argument on the motion, the Court noted that the configuration of the courtroom itself made the presence of spectators distracting to the jury. The Court conceded, however, that "maybe that's not a very good reason" to close a trial. J.S. App. at 16a. The Court also observed that in view of the three previous unsuccessful attempts to try the defendant, every effort should be taken at the trial then in progress to assure that "the . . . rights of the defendant are [not] infringed in any way. . . ." *Ibid.* Defendant's motion was then granted

and the courtroom remained closed for the duration of the trial.

Appellants petitioned the Supreme Court of Virginia for writs of mandamus, J.S. App. at 25a, and prohibition, J.S. App. at 28a, and filed an appeal from the closure order, J.S. App. at 24a. Relief was denied in each case, based on this Court's recent decision in *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979).

The public record leaves the actual events of the trial open to conjecture. An order was entered by the trial judge on September 12, 1978. It shows that defendant's motion for a mistrial had been "taken under advisement" —although no grounds for the motion were stated and no reasons given why the court did not dispose of it. The order also revealed that, "on grounds stated to the record," the Court had sustained the defendant's motion to strike the Commonwealth's evidence at the close of the Commonwealth's case. And it found the defendant not guilty of murder, as charged in the indictment. J.S. App. at 44a. Thus, on the morning after the dismissal of the charge, newspapers could only report that a man who had been tried four times for an alleged murder in 1976 had been set free.

SUMMARY OF ARGUMENT

I.

The Sixth Amendment guarantee of a "public trial" embodies a long-standing Anglo-American tradition of conducting criminal trials in public view. As an historical matter, that tradition was based as much on the societal interests served by public trials as it was on the interests of the accused. And although the public trial is set forth in the Sixth Amendment together with other rights of the "accused," the Framers did not thereby

intend to deny the public's interest in public criminal trials as a matter of constitutional concern.

The public's interest in open criminal trials can only be protected by recognition of an implicit constitutional right to attend criminal trials. Protection of the public's interest cannot be entrusted to the individual defendant. For he has little, if any, interest in some of the broad societal functions of public trials—such as informing the public, promoting the appearance of justice, and satisfying the victim that justice has been done. And in a particular case, he may have an interest in defeating some important societal functions of public trials—such as guarding against bias on the part of the judge, deterring perjury, and encouraging unknown witnesses to come forward. There is, in short, "an *independent* public interest in the enforcement of [the] Sixth Amendment guarantee" of a public trial. *Gannett Co.* v. *DePasquale*, 99 S. Ct. 2898, 2907 (1979) (emphasis supplied).

Protection of this independent public interest in open proceedings cannot be left to the other participants in the proceedings, the prosecutor and the judge. The public trial guarantee exists in large measure to guard against their misconduct, and the independent public interest in open proceedings cannot be entrusted entirely to the parties whose misconduct may escape detection in closed proceedings. Moreover, as a practical matter, the prosecutor and the judge may be hesitant to stand in the way of a defendant's desire for a closed proceeding—either out of fear of reversal or a genuine desire to appear fair and cooperative to the defendant.

Finally, because members of the public have a direct, personal interest in *participating* in criminal trials as spectators, they are appropriate parties to object to their exclusion.

II.

In their most fundamental application, the First Amendment guarantees of free speech and free press protect "the paramount public interest in a free flow of information to the people" concerning the affairs of government, including the administration of justice. *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964). Thus, "the public has the right to be informed as to what occurs in its courts." *Estes* v. *Texas*, 381 U.S. 532, 541 (1965).

Every Member of this Court in *Estes* recognized, at least implicitly, that the First Amendment protects the right of the public and the press to attend criminal trials. That recognition is buttressed by the Court's express acknowledgment in *Branzburg* v. *Hayes*, 408 U.S. 665, 681, 707 (1972), that the acquisition, or gathering, of information is entitled to some measure of constitutional protection. And it is completely unaffected by the Court's subsequent "right-of-access" decisions. *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978). Unlike prisons and government institutions and proceedings generally, a criminal trial is a "public event." *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). As a matter of common law tradition and constitutional principle, every criminal trial is presumptively open, and that presumptive openness fundamentally alters the nature of the First Amendment issue in this case.

III.

Under any scheme that recognizes the public's constitutional right to attend criminal trials, there can be no basis for excluding the public from any portion of a criminal trial in order to protect the defendant's right to a fair trial. The defendant's rights can always be protected through alternative measures, such as sequestration, and the exercise of the court's inherent power to control the conduct of courtroom spectators and trial participants.

ARGUMENT

I. THE SIXTH AMENDMENT PROTECTS THE RIGHT OF THE PUBLIC TO ATTEND CRIMINAL TRIALS.

A. Introduction: The Right To A Public Trial.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." This provision rests on a deep-seated "Anglo-American distrust for secret trials," *In re Oliver*, 333 U.S. 257, 268 (1948), based on the belief that "justice cannot survive behind walls of silence." *Sheppard* v. *Maxwell*, 384 U.S. 333, 349 (1966).[3]

The tradition in this country of conducting criminal trials in public view is an unbroken one. When this Court decided *In re Oliver*, *supra*, in 1948, it was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." 333 U.S. at 266.[4] That observation remained true during the thirty years from the Court's decision in *In re Oliver* until the entry of the closure order in this case.[5] This tradition

[3] The public trial guarantee is recognized as fundamental to our system of criminal justice, and is therefore fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment. *In re Oliver*, 333 U.S. 257 (1948). See *Duncan* v. *Louisiana*, 391 U.S. 145, 148-50 (1968); *Argersinger* v. *Hamlin*, 407 U.S. 25, 28 (1972).

[4] "Nor," the Court continued, "have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute." 333 U.S. at 266.

[5] Prior to this case, there had been a few, isolated instances in which members of the public were excluded from limited portions of a trial. These cases are discussed in the Court's opinion in *Gannett Co.* v. *DePasquale*, 99 S. Ct. 2898, 2910 n.19 (1979), and in the concurring and dissenting opinion of Mr. Justice Blackmun, *id.* at 2931 n.11.

of openness, embodied firmly in an express constitutional provision, has become ingrained in the very notion of a criminal trial: "A trial is a *public event*. What transpires in the court room is public property." *Craig* v. *Harney*, 331 U.S. 367, 374 (1947) (emphasis supplied).

In *Gannett Co.* v. *DePasquale*, 99 S.Ct. 2898 (1979), this Court held that the Sixth Amendment's public trial guarantee does not protect the right of the public to attend a *pretrial* hearing on a motion to suppress evidence.[6] The Sixth Amendment question presented in this case is whether the members of the public have any constitutionally protected right to attend criminal *trials*.

B. The Sixth Amendment Protects Important Public Interests.

One point on which there was agreement among all Members of the Court in *Gannett* was that there is, in addition to the defendant's interest, "a strong societal interest in public trials." 99 S.Ct. at 2907. See also *id.* at 2913 (Burger, C.J., concurring), 2914 (Powell, J., concurring), 2930-31 (Blackmun, J., concurring in part and dissenting in part). Public trials, in fact, serve a number of societal interests:

—They serve as a "restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. at 270.

[6] In a concurring opinion, the Chief Justice was careful to preserve the question that is posed in this case—whether the public enjoys a right under the Sixth Amendment to attend the trial itself. 99 S.Ct. at 2913. Prior to *Gannett*, this Court had never considered whether the public trial guarantee has any application to pretrial proceedings. Since *Gannett* did not present the question whether the defendant has any right to public pretrial proceedings, that question may still be regarded as an open one. While other Sixth Amendment rights, such as the right to counsel, are clearly applicable "[i]n all criminal *prosecutions*," the guarantee of openness, like that of speediness, is expressed in terms of the right to a "speedy and public *trial*." (Emphasis supplied.) But see *United States* v. *Cianfrani*, 573 F.2d 835, 848-51 (3d Cir. 1978); *United States* v. *Clark*, 475 F.2d 240, 246-47 (2d Cir. 1973).

—They guard against misconduct by the police and prosecutors. *Sheppard* v. *Maxwell*, 384 U.S. at 350.

—They protect the integrity of the trial process by deterring perjury. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2930 (Blackmun, J., concurring in part and dissenting in part).

—They promote the search for the truth by inducing unknown witnesses to come forward with relevant testimony. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2907.

—They "cause all trial participants to perform their duties more conscientiously." *Ibid.*

—They perform an informative, educative function by enabling the public to observe the operation of the criminal justice system and the conduct of public officials, many of whom are elected. *Gannett Co.* v. *DePasquale*, 99 U.S. at 2907; *id.* at 2930 (Blackmun, J., concurring in part and dissenting in part); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975); *Lewis* v. *Peyton*, 352 F.2d 791, 792 (4th Cir. 1965).

—They enable the victim of crime, his family and friends to satisfy themselves that justice has been done. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2930 (Blackmun, J., concurring in part and dissenting in part).

—They promote the appearance of justice. *Id.* at 2931; *Levine* v. *United States*, 362 U.S. 610, 616 (1960).

The recognition that public trials serve important societal interests is not of recent vintage; it was central to the tradition of public trials that ultimately gave rise to the Sixth Amendment's public trial guarantee. Indeed, as Mr. Justice Blackmun persuasively demonstrated in his opinion in *Gannett*, the early English tradition of conducting criminal trials in public was established "long before the defendant was afforded even the most rudimentary rights," 99 S.Ct. at 2927, for reasons "quite

unrelated to the rights of the accused." *Id.* at 2925-26. "And there is strong evidence that the public trial . . . widely was perceived as serving important social interests, relating to the integrity of the trial process . . . ." *Id.* at 2928.

When the English common law tradition of public trials was transplanted to the colonies, it was initially viewed as "a characteristic of the system of justice, rather than . . . a right of the accused."[7] *Id.* Of course, by the time the Sixth Amendment was adopted, the public trial had come to be recognized as an important right of the accused. It was therefore appropriate, as well as convenient, for the Framers to include the public trial guarantee in the Sixth Amendment's list of the accused's rights. But it is unlikely, in view of the common law history of public trials and the history of the Sixth Amendment itself,[8] that the inclusion of the public trial as one of the rights of the accused was intended by the Framers as an exclusive statement of the guarantee's foundation.[9]

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[7] Thus, the first public trial provision to appear in the colonies spoke not in terms of the right of the accused, but in terms of the right of the public to attend trials:

> "That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner."

Concessions and Agreements of West New Jersey (1677), Ch. XXIII, quoted in 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971).

[8] That history is set forth in Mr. Justice Blackmun's opinion in *Gannett*, 99 S.Ct. at 2929-30, and will not be recounted in this brief.

[9] Indeed, the initial proposal for a public trial amendment to the Constitution did not cast the right as one belonging to the accused, but urged simply that Congress propose an amendment providing that the "trial should be speedy, public, and by an impartial jury. . . ." Amendments Proposed by New York (1788),

[Footnote continued on page 18]

Certainly in the absence of any debate on the question, it is unlikely that the Framers intended to deny the public's interest in open proceedings as a matter of constitutional concern. It is probable that the Framers, aware that publicity generally serves the interest of both the accused and the public, did not anticipate the day when the accused would seek to be tried behind closed doors, and therefore did not appreciate the need to consider whether the public's interest in publicity required separate, express recognition in the Constitution. Under these circumstances, the absence of express recognition of a public right to attend criminal trials is surely not dispositive.[10] It is appropriate to consider whether the public's interest in public trials is implicitly protected by the Sixth Amendment, by considering whether the public's interest is subsumed completely in the interest of the individual defendant and, if not, whether the public's interest is adequately protected without recognition of an enforceable public right to attend criminal trials.[11]

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quoted in 1 Elliott's Debate, 328 (2d ed. 1836). As Mr. Justice Blackmun noted, there is no indication that the Framers' incorporation of the New York proposal in the Amendment as adopted was intended as a rejection of the public's right to attend criminal trials. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2929-30 (Blackmun, J., concurring in part and dissenting in part).

[10] If an express textual basis for the public's rights under the Sixth Amendment is necessary, it can be found in the term "trial" itself, a term that has its own meaning. *Bridges* v. *California*, 314 U.S. 252, 271 (1941); *Estes* v. *Texas*, 381 U.S. at 559 (Warren, C.J., concurring). "The trial is always public." 3 J. Story, Commentaries on the Constitution of the United States 662 (1833). As Mr. Justice Harlan noted in *Estes*, the right to a public trial "inhere[s] in the institutional process by which justice is administered." 381 U.S. at 588. *Amici* submit, however, that an express textual basis for the public's right to a "public trial" is unnecessary. The Framers expressly provided in the Ninth Amendment that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[11] Certainly the suggestion that the Sixth Amendment implicitly protects the rights of the public is not without precedent. In

[Footnote continued on page 19]

C. The Public's Interest In Public Trials Requires Recognition Of A Sixth Amendment Right To Attend Criminal Trials.

1. *The Public's Interest Is Independent Of The Defendant's Interest.*

Although the defendant as a general matter has a vital interest in many of the benefits of public trials, the

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Singer v. *United States*, 380 U.S. 24, 35 (1965), the Court stated that "although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States* v. *Kobli*, 172 F.2d 919, 924 (3d Cir. 1949) (by implication)." The "implication" referred to in *Kobli* was that the defendant's right to waive a public trial is limited by the public's *constitutional* right to attend the trial:

> ". . . 'it is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on . . . have a right to be present . . . .'
>
> ". . . the right thus accorded to members of the public to be present at a criminal trial as mere spectators . . . has been imbedded in our Constitution as an important safeguard not only to the accused but to the public generally." 172 F.2d at 924.

In *Estes* v. *Texas*, 381 U.S. 532, 559 (1965), three of the five Justices forming the majority assumed that the public trial guarantee, although primarily for the benefit of the defendant, also conferred rights on the public. The electronic media, not the defendant, asserted Sixth Amendment claims in that case, and those three Justices did not reject those claims by holding that the public has no rights under the Sixth Amendment, but rather by addressing themselves to the minimum scope of the public trial guarantee:

> "This prohibition [on televising criminal trials] does not conflict with the constitutional guarantee of a public trial, because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, . . . when the public is free to use those facilities . . . ." 381 U.S. at 584 (Warren, C.J., concurring).

See also *id.* at 595 (Harlan, J., concurring) ("Attendance by interested spectators . . . will fully satisfy the safeguards of 'public trial.' ")

public's interest in those benefits does not vanish simply because a particular defendant does not see the virtues of publicity. The public's interest persists regardless of the personal desires of the individual defendant.

The public's interest, in fact, may be quite different from the interest of the individual defendant. The individual defendant has little, if any, interest in some of the broad societal functions of a public trial—such as informing the public, enabling the victim and his family to satisfy themselves that justice has been done, and promoting the appearance of justice. Indeed, a particular defendant may have an interest in defeating some of the broad societal functions that public trials are designed to serve—such as guarding against bias on the part of the judge, deterring perjury, and encouraging unknown witnesses to come forward. A corrupt, biased or incompetent judge may favor the defendant as well as the prosecution. Perjury is certainly as great a temptation to the defendant's witnesses as it is to the prosecution's. And the unknown witness is as likely to favor the government as the accused. In short, "a secret trial can result in favor to as well as unjust prosecution of a defendant." *Lewis* v. *Peyton*, 352 F.2d 791, 792 (4th Cir. 1965). For these reasons, the public's interest in public trials does not necessarily coincide with that of the defendant, and protection of the public's interest cannot be entrusted to the defendant.[12]

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[12] See also *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884), in which Justice Holmes analogized the privilege for reports of judicial proceedings to the "access of the public to the courts," and stated the privilege's rationale as follows:

> " 'Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.' " (Quoting *The King* v. *Wright*, 8 T.R. 293, 298 (K.B. 1799).

In short, as the Court recognized in *Gannett*, there is "an *independent* public interest in the enforcement of [the] Sixth Amendment guarantee" of a public trial. 99 S.Ct. at 2907 (emphasis supplied). The crucial question is whether that independent public interest is adequately protected by the other participants in the litigation, or whether recognition of an enforceable public right is essential to safeguard that interest.

2. *The Public's Interest Is Not Adequately Protected By The Other Participants In The Litigation.*

In *Gannett*, the Court concluded that there was no basis for inferring a Sixth Amendment right on the part of the public to attend pretrial proceedings, because of its view that "[i]n an adversary system of criminal justice, the public interest . . . is protected by the participants in the litigation." 99 S.Ct. at 2907. Like the public interest in speedy trials and trial by jury, the Court concluded, the independent public interest in public proceedings is adequately protected by the prosecutor and the court.

Amici submit that, whatever assumptions might generally be made about the ability of the prosecutor and the court to protect the public interest, they are peculiarly unsuited to protect the independent public interest in public trials. For three reasons, it is both necessary and appropriate for the Court to recognize a constitutional right, enforceable by the public, to attend criminal trials.

First, the suggestion that the public's independent interest in public trials can be adequately protected by the prosecutor and the court is fundamentally at odds with the basic rationale of the public trial guarantee. The guarantee exists in large measure to guard against misconduct by the judge and by the prosecutor. It is un-

thinkable that the law would entrust to the judge and the prosecutor alone the public interest in guarding against their own misconduct. Simple logic dictates that the public interest in enforcement of a constitutional guarantee not be entrusted entirely to the very parties against whose potential misconduct the guarantee is designed to protect.[13] The prosecutor or judge whose misconduct may be hidden from public view in closed proceedings simply cannot be presumed on his own initiative [14] to consider in good faith the public's interest in having the proceedings open.[15]

Second, assuming that the prosecutor and the judge are acting in good faith, as a practical matter they may

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[13] The difficulties inherent in accepting the prosecutor and the court as adequate guardians of the public's independent interest in public trials are easily illustrated. Mr. Justice Blackmun's example of connivance between a defendant, a prosecutor and a judge of the same political party to close a trial, followed by an acquittal or other favorable ruling by the court, *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2935, is but one example that comes to mind. A defendant who waives his right to a public trial—in an effort, perhaps, to avoid the embarrassment of publicity—may also become an unsuspecting victim of judicial or prosecutorial misconduct, and the prosecutor or judge who is inclined to abuse his power in the course of the trial will hardly be inclined to oppose the defendant's request that the trial be closed.

[14] Both the prosecutor and the judge are more likely to give fair consideration to the public's interest if interested members of the public are given an opportunity to be heard, and the judge is required to make specific findings before ordering closure. See p. 42 *infra*.

[15] As Jeremy Bentham noted, in urging that criminal trials not be closed even at the request of the defendant:

> "The reason is . . . there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the other persons concerned (the judge included) be made a sacrifice." J. Bentham, The Rationale of Judicial Evidence 576-77 (1827).

be less than vigilant in fulfilling their "duty to protect the societal interest in an open trial." *Gannett*, 99 S.Ct. at 2908 n.12. Absent recognition of an enforceable constitutional right on the public's part, which will ensure that the public's interests are vigorously presented by persons who will be directly affected by a closure order, the dynamics of a closure motion are such that the prosecutor and the judge may be hesitant to stand in the way of the defendant's desire for a closed proceeding. Both may be concerned about the possibility of a reversal if the defendant's request is denied. In addition, a genuine spirit of cooperation on the part of the prosecutor, or a desire to appear cooperative to the judge, may deter him from interposing any objection to a request that will not impede the presentation of his case. And the judge's concern that the defendant be treated fairly and believe himself to have been treated fairly may lead the judge to accede to a request that is unopposed by the prosecutor, without any real consideration of the public's interest.[16]

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[16] If these concerns appear unrealistic, one need only consider the course of the proceedings in this case. When defendant's counsel made his oral request to clear the courtroom, the court asked the prosecutor whether he had any objection. This brief exchange then occurred:

> "THE COURT: . . . Do you have any objection to clearing the Courtroom, Mr. Bynum [the prosecutor]?
>
> MR. BYNUM: Uh, no sir, I'll leave it to the discretion of the Court. Are you talking about every—are you talking about everyone; the press included? Is that—does your motion extend to them?
>
> MR. NORWOOD: Yes, sir, that would be my motion.
>
> THE COURT: All right, sir.
>
> MR. BYNUM: It's in the discretion of the Court. You know, I—I understand, you know. It's strictly on defense motion.
>
> THE COURT: Yes, sir, well, the statute gives me that power specifically—
>
> MR. BYNUM: Yes, sir.

[Footnote continued on page 24]

By contrast, the public's interest in the enforcement of the right to a jury trial and its interest in the enforcement of the right to a speedy trial are not apt to be so easily disregarded by the prosecutor and the court. The timid prosecutor or judge need not fear a reversal or mistrial if the defendant's request to waive his jury trial right is denied, and to that extent he will be less inclined simply to acquiesce in the defendant's request. In addition, the prosecutor and the judge may well have compelling reasons to prefer a jury trial—the prosecutor because he fears the judge may be overly sympathetic to the defendant, and the judge because he believes that the responsibility for decision in a particular case should be borne by a jury. Similarly, the prosecutor and the judge need not be overly concerned about a reversal based on the denial of a defendant's request for a postponement of his trial—if adequate reasons exist they will be evident at the time, whereas the basis for a closure motion is the fear of events that cannot be anticipated. Moreover, the prosecutor often has a strong interest in proceeding to trial without delay, and the judge has an interest in advancing his docket. It is only when the defendant seeks to waive his right to a public trial, then, that the fear of reversal and the absence of any strong countervailing prosecutorial or judicial interest combine to produce a situation in which the public's interest is apt to be overlooked.

Third, the public's interest in public trials is fundamentally different in nature from its interest in other Sixth Amendment guarantees, in a way that underscores

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THE COURT: —and the defendant has made the motion and I'll rule that the Courtroom be kept clear of all parties except the witnesses when they testify." J.S. App. at 7a-8a.

Neither the prosecutor nor the court gave the slightest consideration to the public's interest in open proceedings.

the appropriateness of recognizing an enforceable public right to insist upon public trials. The public's interest in jury trials and speedy trials, for example, is indirect and general in nature. Its interest in public trials, on the other hand, is a direct, *participatory* interest. Members of the public have an interest in participating in criminal trials as observers, and their interest in participating makes them appropriate parties to object to their exclusion. It is surely true, as the Court noted in *Gannett*, that a member of the public cannot raise an objection to the defendant's waiver of a jury trial or the defendant's request for a continuance. But it is clearly appropriate, *amici* submit, to recognize the right of a member of the public to object to a request that he be excluded from the courtroom.[17]

As the foregoing discussion demonstrates, the public's interest in enforcement of the Sixth Amendment public trial guarantee is qualitatively different from its interest in the enforcement of other Sixth Amendment guarantees. Protection of the public's independent interest in public trials can only be assured by recognition of an enforceable Sixth Amendment right on the part of the public to attend criminal trials.

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[17] This point is supported by traditional standing principles. A member of the public seeking to attend a criminal trial, as opposed to one demanding that a defendant be tried by jury or denied a continuance, has "a personal stake in the outcome of the controversy." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). His is not simply "the generalized interest of all citizens in constitutional governance," which the Court has characterized as too "abstract" to support standing. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 217 (1974). See also *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *United States* v. *Richardson*, 418 U.S. 166, 173, 175 (1974). His interest in observing the proceedings firsthand is a direct, personal one; and consequently his exclusion from the courtroom causes him to suffer a "particular, concrete injury" that is sufficient to confer standing. *United States* v. *Richardson, supra*, at 180, quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 740-41 n.16 (1972). See *United States* v. *SCRAP*, 412 U.S. 669, 687-90 (1973).

II. THE FIRST AMENDMENT PROTECTS THE RIGHT OF THE PUBLIC TO ATTEND CRIMINAL TRIALS.

In *Gannett*, this Court expressly reserved the question whether the public enjoys a right under the First and Fourteenth Amendments[18] to attend pretrial hearings, and it had no occasion to consider whether there is such a right to attend criminal trials. *Amici* submit that the right to attend criminal trials flows ineluctably from the most fundamental principles underlying the First Amendment, that this Court has implicitly recognized a First Amendment right to attend criminal trials, and that continued recognition of that right is fully warranted in view of the relevant precedents.

A. The First Amendment Protects The Right Of The Public To Be Informed About The Conduct Of Government, Including The Administration Of Justice.

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The First Amendment thus promotes the most basic goal of a democratic system—an informed citizenry. It ensures that the people—the ultimate repository of power and sovereignty—will have the ability effectively and intelligently to govern themselves.

[18] The First Amendment is fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment. *E.g.*, *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 749 n.1 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

> "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).[19]

Of course, "[t]he protection of the public requires not merely discussion, but information." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964). In its most fundamental application, then, the First Amendment guarantee of freedom of speech protects "the paramount public interest in the free flow of information to the people" concerning the affairs of government. *Garrison* v. *Louisiana*, 379 U.S. at 77.[20] Similarly, "[t]he predominant purpose of [the free press guarantee] was to preserve an untrammeled press as a vital source of public information." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

Equipped with information about the affairs of government, the people will have the ability to assure that it is responsive to their will, and to engage in the public debate necessary to arrive at the wisest governmental

[19] "Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power." A. Meiklejohn, *The First Amendment is an Absolute*, 1961 S.Ct. Rev. 245, 257.

See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); Z. Chafee, Free Speech in the United States (1931).

[20] See also *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85, 92, 95, 98 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976); *Pell* v. *Procunier*, 417 U.S. 817, 832 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 725-26 (1972) (Stewart, J., dissenting); *Lamont* v. *Postmaster General*, 381 U.S. 301, 306 (1965); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

policies.[21] Without information about the conduct of government, the people are powerless to control it. As James Madison wrote:

> "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

The First Amendment's protection of the "free flow of information" to the public necessarily encompasses the receipt of information and ideas, as well as their publication. As this Court stated in *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), "It is now well established that the Constitution protects the right to receive information and ideas." Thus, for example, in *Martin* v. *Struthers*, 319 U.S. 141 (1943), the Court struck down an ordinance prohibiting door-to-door distribution of literature, not simply because it violated the First Amendment "right to distribute literature," but also because it infringed "the right to receive it." *Id.* at 143. In *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), the Court invalidated a provision of the Postal Service Act authorizing the Postmaster General to detain "communist political propaganda" mailed from abroad, based on "the addressee's First Amendment rights" to receive it.[22] And in

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[21] See generally *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-70 (1964); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931).

[22] Mr. Justice Brennan, while joining the Court's opinion in *Lamont*, also wrote separately to underscore the essential character of the right to receive information.

> "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308.

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936), the Court invalidated a license tax on the advertising revenues of the printed press, because it "limit[ed] the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *Id.* at 250.[23]

The First Amendment guarantees of free speech and free press thus protect the right of the people to receive information—to be informed—about the affairs of government. This protection undoubtedly extends to information pertaining to the administration of justice in general, and the conduct of criminal trials in particular. As the Court noted in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975):

> "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." [24]

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[23] There are numerous other decisions and expressions by the Court to the same effect. See, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Pell* v. *Procunier*, 417 U.S. at 832; *Procunier* v. *Martinez*, 416 U.S. 396, 408-09 (1974); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-65 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *Marsh* v. *Alabama*, 326 U.S. 501, 505 (1946); *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945). To be sure, the right to receive information at issue in these cases was limited in that the Court's reasoning "presuppose[d] a willing speaker." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. at 756. But the cases nevertheless recognize that the First Amendment serves a vital informing function, and that the interest in receiving information is entitled to enforcement in its own right.

[24] See also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978); *Sheppard* v. *Maxwell*, 420 U.S. 333, 349-50 (1966); *Craig* v. *Harney*, 331 U.S. 367, 374 (1947); *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Opinion of Frankfurter, J., respecting denial of certiorari).

The public, in short, "has the right to be informed as to what occurs in its courts." *Estes* v. *Texas*, 381 U.S. 532, 541 (1965).

B. The Right To Attend Criminal Trials Is An Indispensable Element Of The Right To Be Informed About The Administration Of Justice.

If the right of the public "to be informed as to what occurs in its courts" is to have meaning, it must embrace a right to attend criminal trials. As discussed below, in *Estes* v. *Texas*, *supra*, this Court recognized, at least implicitly, that the press and the public enjoy a First Amendment right to attend criminal trials. That recognition is buttressed by the Court's express acknowledgment in *Branzburg* v. *Hayes*, 408 U.S. 665, 681, 707 (1972), that the acquisition, or gathering, of information is entitled to some measure of constitutional protection. And it is completely unaffected by the Court's subsequent "right-of-access" decisions. *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978).

In *Estes*, the Court held that the defendant "in a heavily publicized and highly sensational" [25] criminal trial had been deprived of his right to a fair trial by the televising and broadcasting of the proceedings, in light of then-available technology and prevailing public attitudes. In the course of its opinion, the Court considered the related contentions that the First Amendment protected the right of the press to televise criminal trials and the right of the public to be informed by means of televised proceedings. See *id.* at 539-42.[26] The Court rejected those contentions, at least in light of the prevailing technology and public attitudes, but left no doubt as to its view that the First Amendment protects the right of the press, as well as the public, to *attend* criminal trials. The Court reasoned as follows:

> "It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media." *Id.* at 541-42.[27]

The Court referred to these rights to attend and report as the "reportorial privileges of the press," *id.* at 542,[28] and the entire thrust of the Court's opinion was that the First Amendment right to attend and report on criminal trials must be accommodated fully to the extent that it does not infringe the defendant's right to a fair trial.[29]

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[25] Mr. Justice Harlan, whose vote was decisive, joined the Court's opinion only to the extent that it was limited to such cases. 381 U.S. at 590-91.

[26] See also Brief of the National Association of Broadcasters et al. as *Amici Curiae*, *Estes* v. *Texas*, at 5-12; Brief for Respondent, at 22-24; Brief for the Petitioner, at 34-37.

[27] The Court also stated:

"Nor can the courts be said to discriminate [against the television and radio reporter] where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public." 381 U.S. at 540.

[28] "These reportorial privileges of the press were stated years ago:

'The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials . . .' 2 Cooley's Constitutional Limitations 931-932 (Carrington ed. 1927)." 381 U.S. at 542.

[29] "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption

[Footnote continued on page 32]

Chief Justice Warren, joined by Mr. Justice Douglas and Mr. Justice Goldberg, repeated the point in a separate concurring opinion:

> "So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of the press." *Id.* at 585.

And in a dissenting opinion, Mr. Justice Stewart, joined by Mr. Justice Black, Mr. Justice Brennan, and Mr. Justice White, questioned the Court's suggestion that the *televising* of the trial was not protected by the First Amendment:

> "While no First Amendment claim is made in this case,[30] there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. . . . Where there is no disruption of the 'essential requirement of the fair and orderly administration of

among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process." 381 U.S. at 539.

[30] The case was before the Court on the defendant's appeal from his conviction, not from any ruling on a claimed right to televise or broadcast the proceedings.

> justice,' '[f]reedom of discussion should be given the widest range.'" *Id.* at 614-15 (citations deleted).

Every Member of the Court in *Estes* thus recognized, at least implicitly, that the public and the press enjoy a First Amendment right to attend criminal trials.[31]

The right to attend criminal trials, *amici* submit, arises unmistakably from the informing function of the First Amendment. For that function is not satisfied by enforcement of the rights to publish and receive information discussed in Part II A, *supra*. As this Court has expressly recognized, the initial acquisition, or gathering, of information by the press and the public is also entitled to some measure of protection.

[31] It may be suggested that, contrary to the implication in *Estes*, the informing function of the First Amendment is satisfied so long as a transcript of the proceedings is made available to the public. That suggestion is without merit for two reasons. First, the consequent delay in transmission of information, which can destroy its timeliness and immediacy, is itself a serious threat to First Amendment values. See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 560-61 (1976); *id* at 609 (Brennan, J., joined by Stewart and Marshall, JJ., concurring); *Bridges* v. *California*, 314 U.S. 252, 268-69, 277-78 (1941); *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962); *Pennekamp* v. *Florida*, 328 U.S. 331, 346 (1946). "Indeed, it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." A. Bickel, The Morality of Consent 61 (1975).

Second, a transcript of the proceedings is no substitute for the ability to observe a trial firsthand. The transcript may contain errors, and, more importantly, it does not record everything that takes place in the courtroom. Crucial elements of the trial—motions, pauses, tone of voice, facial expressions—will be lost forever if the public's knowledge is limited to the content of the transcript. The public's ability to judge the fairness of the proceedings, the credibility of witnesses, and the performance of the participants, including the jury, will be irreparably harmed.

In short, the immediacy, and the very quality, of information available to the public concerning criminal trials will suffer drastically if the public's knowledge of the proceedings is to be restricted to the content of a naked transcript.

Thus, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the Court expressly noted that "news gathering is not without its First Amendment protections," *id.* at 707, and explained that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Mr. Justice Stewart expressed the same point:

> "No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist." *Id.* at 728 (Stewart, J., dissenting).

Mr. Justice Stevens has explained the rationale behind the First Amendment's protection of information-gathering in terms that make clear its importance to self-government and its applicability to the public, as well as the press:

> "It is not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 32 (1978) (Stevens, J., dissenting).

See also *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 862-64 (1974) (Powell, J., dissenting).

The right of the public and the press to gather information is, concededly, not without limits. In *Zemel* v. *Rusk*, 381 U.S. 1 (1965), the Court rejected a First Amendment challenge to the Secretary of State's refusal to validate United States passports for travel to Cuba, citing "the weightiest considerations of national security," as evidenced by the Cuban missile crisis that preceded the filing of the complaint by less than two months. Char-

acterizing the Secretary's refusal as "an inhibition of action," the Court noted that "there are few [such] restrictions . . . which could not be clothed by ingenious argument in the garb of decreased data flow." *Id.* at 16-17.

> "For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.* at 17 (emphasis supplied).

Nothing in the Court's decision in *Zemel* casts any doubt on the right of the public to attend criminal trials, implicitly recognized in *Estes*. As the Court expressly recognized in *Kleindienst* v. *Mandel*, 408 U.S. 753, 764-65 (1972), *Zemel* cannot be read as suggesting that an inhibition survives First Amendment scrutiny so long as it can be characterized as an inhibition on action. See also *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Saxbe* v. *Washington Post Co.*, 417 U.S. at 858-59 (Powell, J., dissenting). *Zemel* merely held that action in pursuit of information is subject to the traditional authority of the Secretary of State to restrict foreign travel in the national interest.[32] It also made clear that such action is subject to other limitations, such as the prohibition of "unauthorized entry into the White House." Attendance at criminal trials, however, is fundamentally

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[32] *Zemel* is thus closely analagous to *Kleindienst* v. *Mandel* itself, in which the Court acknowledged that the First Amendment right to "receive information and ideas" was implicated in the government's exclusion of an alien scheduled to speak in this country, but held that right to be subject to the "plenary congressional power to make policies and rules for exclusion of aliens." 408 U.S. at 769.

different from travel to Cuba or admission to the White House. No passport is needed, and no custom or law prohibits "unauthorized entry." By contrast, entry is, as the Court recognized in *Estes*, presumptively permitted.

If anything, the Court's rejection of an "unrestrained right to gather information" in *Zemel* adds force to its implicit recognition in *Estes* of a right to attend criminal trials. *Estes* and *Zemel* were under consideration by the Court at the same time, and *Estes* was decided one month after *Zemel*. Thus, the Court was clearly sensitive to the limits on the right to gather information when it decided *Estes*, and for that reason its clear intimation of a right to attend criminal trials assumes even greater significance than it ordinarily would have.

Subsequent decisions have recognized other limitations on the right to gather information, but the right to attend criminal trials is unaffected by those decisions as well. In *Branzburg*, the Court noted that "the First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally." 408 U.S. at 684. And the Court later applied that principle to uphold prison regulations denying the press access to prisons superior to that afforded the public generally. In *Pell* v. *Procunier*, 417 U.S. 817 (1974), the Court rejected a challenge by the press to a prison regulation limiting media interviews with inmates. It noted at the outset that the regulation was "not part of an attempt by the State to conceal the conditions in its prisons," and that it accorded the press and the general public "full opportunities to observe prison conditions." *Id.* at 830. The Court then concluded that the refusal to extend to the press any special interviewing privilege not accorded the public generally posed no constitutional difficulty, because "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 834.

The Court applied this same reasoning in a second case decided on the same day as *Pell*, rejecting a media challenge to federal regulations limiting interviews with prison inmates. *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974). And in *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978), the Court once again reaffirmed the principle that the news media do not have a special constitutional right of access to prisons, "over and above that of other persons." *Id.* at 3 (Opinion of the Chief Justice). See also *id.* at 16 (Stewart, J., concurring in the judgment).

Nothing in the Court's prison-access decisions, however, casts any doubt on the right of the public and the press to attend criminal trials. Those decisions merely rejected a special right of access by the press to government institutions that, notwithstanding the community's interest in their operation, have been traditionally set apart from and closed to the community at large. Even if they were to be read broadly, as rejecting a general claim of public access to government institutions or government-held information, the prison cases do not undermine the clear implication of *Estes*—that the public and the press have a right to sit as observers at criminal trials. For a criminal trial is vitally different from a prison, and from government institutions and proceedings generally, and those differences fundamentally alter the nature of the First Amendment claim in this case.

A criminal trial is no ordinary government proceeding. Indeed, the term "government proceeding" seems peculiarly ill-suited to a criminal trial. As noted earlier in this brief:

> "A trial is a *public event*. What transpires in the court room is public property." *Craig* v. *Harney*, 331 U.S. at 374 (emphasis supplied).

This characterization of a criminal trial as a "public event" is amply supported by an unbroken tradition, in

this country and in England, of conducting criminal trials in full view of the public. See pp. 14-17, *supra*.[33] It is supported, too, by an express provision of the Constitution, the Sixth Amendment's guarantee of a "public trial." Even if that provision does not, by itself, establish a right enforceable by the public to attend criminal trials, "[t]here is no question that [it] . . . presumes open trials as a norm." *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2908.[34] Both as a matter of common law tradition and constitutional principle, then, every criminal trial is presumptively open. And that presumptive openness not only serves to guarantee the integrity of criminal trials that is the overriding concern of the Sixth Amendment; it also promotes the First Amendment's central purpose of ensuring an informed public.

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[33] This tradition of public trials has encompassed a tradition of First Amendment protection for reports of events in the courtroom.

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.'"

Sheppard v. *Maxwell*, 384 U.S. 333, 350 (1966) (citations deleted). See *id.* at 362-363 ("Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom.")

[34] Mr. Justice Stevens relied upon the Sixth Amendment's public trial guarantee to support his conclusion in *Houchins* that the public has an interest in how a convicted person is treated, sufficient to warrant recognition of a First Amendment right of access to prisons. 438 U.S. at 36-37 (Stevens, J., dissenting). *A fortiori*, the public trial guarantee would require recognition of a First Amendment right to attend criminal trials.

The presumptive openness of criminal trials distinguishes this case from *Pell*, *Saxbe* and *Houchins*, regardless of how broadly those cases are construed. For the claim in this case is not that the First Amendment grants the public or the press any general right of access to government institutions or to information generated or controlled by the government. The claim is simply that the First Amendment limits the government's power to exclude the public from a proceeding that has always been considered a "public event," and whose very integrity has been viewed as dependent upon its openness.

The attempt here is not to use the First Amendment as a Freedom of Information Act or "sunshine law," or "to require openness from the bureaucracy." Stewart, "Or of the Press," 26 Hastings L.J. 631, 636 (1975). It may well be that political forces and "factors other than the Constitution must determine what government-held data are to be made available to the public." *Houchins* v. *KQED, Inc.*, 438 U.S. at 16 (Stewart, J., concurring in the judgment). But it would be a denial of an unbroken tradition in this country, embodied in an express constitutional provision, to treat an objection to being excluded from a criminal trial—a "public event"—as tantamount to a demand for "government-held data." Unlike "government-held data," which by definition are unavailable to the public absent a decision by the government to release them, a criminal trial is presumptively open to the public.[35]

For these reasons, continued recognition of the public's right to observe criminal trials need not lead to the compelled disclosure of government-held data or to the compelled opening of government institutions and proceed-

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[35] Indeed, since the defendant has no right to compel a closed trial, *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2907 n.11, it is only through the affirmative action of the court that the public can be deprived of information to which it would otherwise be entitled.

ings generally. Nor, in view of the clear and limited rationale articulated in this brief, need it engender any difficulties over the development of standards governing compelled disclosure of, or access to, information. See *Houchins* v. *KQED, Inc.*, 438 U.S. at 14. In short, recognition of the continued vitality of the principles implicit in *Estes* is not at all inconsistent with this Court's "right of access" decisions, regardless of how broadly they are construed.

In sum, the right of the public to attend criminal trials is clearly deserving of First Amendment protection, for the ability of the public to observe criminal trials firsthand has always been recognized as essential to the accomplishment of the First Amendment's most basic objective, an informed public.

III. PROTECTION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL DOES NOT REQUIRE EXCLUSION OF THE PUBLIC FROM A CRIMINAL TRIAL.

This case presents the question whether, and under what circumstances, the defendant's interest in a fair trial justifies the exclusion of the public from a criminal trial.[36] Specifically, it poses the question whether, and

[36] Thus, the Court need not consider when, if ever, any portion of a trial may be closed to protect national security information, but see H.R. 4736, 96th Cong., 1st Sess. (1979) (assuming trial must be public and proposing establishment of certain trial and pretrial procedures for the use of classified information in connection with federal cases), to preserve the confidentiality of the government's "skyjacker profile," see *United States* v. *Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972), to protect trade secrets, to protect an undercover agent's or informant's identity, but see *People* v. *Jones*, 47 N.Y. 2d 409, 418 N.Y.S. 2d 359 (N.Y.Ct.App.), *cert. denied*, No. 79-450 (Nov. 5, 1979), or to preserve the confidentiality of communications seized under 18 U.S.C. § 2510 *et seq.*, see *United States* v. *Cianfrani*, 573 F.2d 835 (3d Cir. 1978). It is *amici's* position, however, that there are substantial constitutional objections to entry of even limited closure

[Footnote continued on page 41]

under what circumstances, the defendant's fair-trial right can justify the exclusion of the public[37] from an *entire* criminal trial. It is *amici's* position that, given the alternatives available to a court to ensure that a defendant receives a fair trial, and given the inherent power of a court to control the conduct of courtroom spectators and trial participants, there is no conceivable situation in which the defendant's fair-trial right can justify the exclusion of the public from an entire criminal trial or, indeed, from any portion thereof.[38]

In light of the views expressed by the Members of the Court in *Gannett*, it is clear that an order excluding the public from a criminal trial, or any portion thereof, could not be entered unless there were a determination, at a minimum, (a) that in the absence of closure the defendant's right to a fair trial is likely to be prejudiced, (b) that there are no alternatives to closure that would adequately protect the defendant's right to a fair trial, and (c) that the entry of a closure order would be effective in guarding against the perceived harm to the defendant's rights. See *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2937-38 (Blackmun, J., concurring in part and dissenting in part); *id.* at 2916 (Powell, J., concurring). In addi-

orders of short duration based on those considerations, at least at the actual trial where the information is being disclosed to a jury, and that those considerations, which relate to specific testimony, certainly could not justify entry of a closure order encompassing an entire trial.

[37] Certainly a court may limit the number of spectators at a trial to those who reasonably can be accommodated in the courtroom.

[38] The Jurisdictional Statement has framed the questions presented in this case in terms of the constitutionality of the Virginia Closure Statute. *Amici* agree with the appellants that the question of that statute's constitutionality is properly before this Court. See note 1, *supra*. Regardless of whether the question of the statute's constitutionality is before the Court, however, the ultimate issue in this case is whether, and under what circumstances, a closure order can be entered to protect the defendant's right to a fair trial. *Amici* will address the case in those terms.

tion, the public could not be deprived of its right to attend a criminal trial without being accorded minimal procedural safeguards: no closure order could be validly entered unless the public had been given an opportunity to be heard on the question of its exclusion [39] and the trial court had made findings revealing the legal and factual bases for that exclusion.[40]

Judged by these standards, the closure order entered in this case was, without question, procedurally and substantively defective. The substantive defects, *amici* submit, do not stem from any peculiar circumstances of this case, but are inherent in the order itself. The order related not to any pretrial proceedings, which may be the source of prejudicial information that could potentially be relayed to prospective jurors, but to the trial itself. Indeed, the order extended to the entire trial [41]—

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[39] *Amici* submit that the right to be heard cannot be limited to those members of the public "actually present" at the time a closure order is made, for that rule would permit total circumvention of the public's rights. First, the closure motion itself might be made in writing under seal, or in an in-chambers conference. Second, even if the motion is made in open court, it may be made at a pretrial proceeding or at another time when members of the public interested in attending the trial are not present. Finally, members of the public present when the motion is made may not be aware of their right to object to a closure request. This does not mean that entry of a closure order must await the delay attendant upon public notice. It means simply that members of the public must be permitted to file written motions and supporting memoranda opposing a previously-entered closure order.

[40] In addition, any closure order could be no broader than absolutely necessary to prevent the perceived harm, and a transcript of the proceedings would be required to be made and released as soon as the threat to the defendant's right to a fair trial had passed. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2916 (Powell, J., concurring); *id.* at 2939 (Blackmun, J., concurring in part and dissenting in part).

[41] While this aspect of the court's order dramatically illustrates its unconstitutional impact, *amici* do not view it as the dispositive aspect. For the reasons discussed in Part B of this section, *infra*,

[Footnote continued on page 43]

including jury selection, opening and closing argument, and the taking of testimony.[42] And the order was not directed to specific individuals whose presence was deemed to pose a threat to the defendant's right to a fair trial, but extended indiscriminately to all members of the public. For the reasons stated in Part B, *infra*, no such order could ever be justified by reference to the defendant's right to a fair trial.

A. The Trial Court Failed Adequately To Consider The Public's Right To Attend Criminal Trials.

The trial court in this case failed to observe the minimum procedural safeguards and make the necessary findings that reflect full and fair consideration of the public's right to attend criminal trials. The court's order that "the Courtroom be kept clear of all parties except the witnesses when they testify" came in response to a brief, unopposed request by defense counsel prior to jury selection, based exclusively on the vague, undifferentiated fear of "information being shuffled back and forth when we have a recess as to . . . who testified to what." J.S. App. at 7a-8a. In entering the order, the court observed simply that "the statute [Virginia Code § 19.2-266] gives me that power," and that "the defendant has made the motion." *Ibid.*

The trial court gave the public no opportunity to voice objections to an exclusion order, and it provided no indication of the legal or factual basis for its order. The court made no effort to accommodate the right of the

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amici cannot conceive of any situation in which closure of any portion of a trial could be justified by any imagined threat to the defendant's fair-trial right.

[42] Because the court sustained a motion to strike the Commonwealth's evidence and declared the defendant not guilty as charged at the close of the Commonwealth's case, it is not clear whether the closure order would have encompassed instructions to the jury, return of the verdict, and sentencing as well.

public to attend the trial, and it required no showing that an open proceeding was even "likely" to prejudice the defendant's right to a fair trial, much less that such an exclusionary order was "strictly and inescapably necessary." Compare *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2916 (Powell, J., concurring) with *id.* at 2936 (Blackmun, J., concurring in part and dissenting in part). Moreover, the court gave no explicit consideration to alternative means of avoiding any perceived danger to a fair trial. Indeed, the court appeared to enter the exclusionary order for no reason other than that "the defendant has made the motion," and the prosecution did not object. Such an order is invalid under any scheme that recognizes the public's constitutional right to attend a criminal trial.

Nor was the court's order legitimized by the subsequent proceedings. After appellants, who had been excluded from the trial, consulted with counsel, they returned with counsel in order to file a motion to open the trial to the press and the public. During the hearing on the motion, which was held after an entire day's proceedings had been held in secret,[43] counsel for appellants emphasized many of the serious constitutional infirmities in the previously-entered exclusionary order, and argued specifically that, before excluding the public, the court must "entertain alternatives which might protect the defendant's rights"—such as "sequestration of the jury or change of venue." J.S. App. at 13a-14a. Confronted with these arguments, the Court simply reaffirmed its prior order, noting in passing that it was the third effort to give the defendant a trial since his initial conviction was reversed, and that because of the "layout of the

[43] The court ordered appellants to leave the courtroom during the hearing on the motion, and considered entry of an order precluding counsel from discussing the hearing with appellants. See J.S. App. at 9a-10a, 13a-19a.

Courtroom," spectators would be "distracting to the jury." J.S. App. at 16a.

The court made absolutely no finding that there was any likelihood of irreparable injury to the defendant's right to a fair trial, or that the entry of a closure order would be effective in guarding against the perceived dangers. Nor did it give any consideration to the alternatives to a closure order. In short, the court failed altogether to give the necessary consideration to the public's right to attend criminal trials, and for that reason alone the order is fatally defective.

The defect in this order, however, is not simply that the court failed to make the express findings that consideration of the public's rights required. As the discussion below indicates, the order in this case would be invalid even if the court had purported to make the appropriate findings. The court's order—indeed, any order excluding the public from a criminal trial—simply cannot be justified by any considerations related to the defendant's right to a fair trial.

B. The Public's Right To Attend Criminal Trials Can Always Be Accommodated With The Defendant's Right To A Fair Trial.

During the proceedings in the trial court, three distinct concerns—arguably related to the defendant's fair-trial right—were discussed as possible bases for entering a closure order. Reference was made, either by the court or by counsel, to (1) the rule against witnesses, (2) juror taint through exposure to inadmissible information or erroneous press accounts of public trial proceedings, and (3) distraction of jurors by those attending the trial. None of those concerns could possibly justify the order entered in this case, or any other order closing all or part of a criminal trial to the public.

1. *The Rule Against Witnesses.*

Defense counsel apparently based his original motion to exclude the public from the courtroom on the fear that courtroom observers might relay the substance of one witness' testimony to another witness yet to testify, thereby circumventing the rule of excluding all witnesses from the courtroom during the testimony of other witnesses. Such an undifferentiated fear certainly cannot form the basis for excluding the public from a criminal trial.

First, it is unlikely that circumvention of the rule against witnesses poses a serious threat to the defendant's right to a fair trial. To be sure, exclusion of witnesses once a trial begins is designed to prevent falsification and to uncover fabrication that has already occurred. See, *e.g.*, 3 Weinstein's Evidence at 615-4 (1977). But although statutes often provide for exclusion as a matter of right,[44] many jurisdictions clearly commit the matter to the sound discretion of the trial court. *Id.* at 615-6. And while the practice of excluding witnesses is "at least as old as the Bible," *id.* at 615-4, *amici* are not aware of any case holding that a violation of a rule against witnesses, without more, constitutes a denial of due process.[45]

Second, there are less restrictive alternatives to total exclusion of the public that will adequately guard against circumvention of the rule against witnesses. Witnesses

[44] See, *e.g.*, Federal Rules of Evidence, Rule 615.

[45] In *Holder* v. *United States*, 150 U.S. 91 (1893), this Court held that it was not error to deny a defendant's request to disqualify a witness who had violated a rule against witnesses. Explaining that the testimony of such a witness "is open to comment to the jury by reason of his conduct," the Court concluded that the witness "is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." *Id.* at 92.

can be instructed not to discuss the case with anyone other than counsel under pain of contempt, see *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 553-54 (1976); *id.* at 601 n.27 (Brennan, J., concurring). And they can be cross-examined about their conversations about prior testimony. In addition, if a showing is made that a particular observer at trial is likely to relay information to witnesses, that observer could be directed not to discuss the testimony with witnesses, or even be excluded from the courtroom.[46]

In *Estes* v. *Texas*, *supra*, this Court recognized that routine newspaper coverage of a trial could frustrate invocation of the rule against witnesses, but implicitly held that that effect cannot justify exclusion of the public or the press from the courtroom. 381 U.S. at 547-48; see *id.* at 590 (Harlan, J., concurring). That conclusion is surely correct. For if the vague fear of frustration of the rule against witnesses were sufficient to justify closure of a trial, then the rule's invocation would justify closure of any criminal case, and the public's right to attend criminal trials would be rendered a nullity.

2. *Juror Taint.*

There can be no doubt that a juror's exposure to inadmissible evidence may, under certain circumstances, threaten a defendant's right to a fair trial.[47] But that concern, which was cited in *Gannett* as a potential basis for closing a pretrial hearing, can hardly justify an order closing the trial itself. The public surely has a right, at

[46] Defense counsel in this case referred vaguely to "this woman that was with the family of the deceased when we were here before." J.S. App. at 7a. He made no showing, however, that she had acted as a "go-between" among prosecution witnesses in the defendant's prior trials, or that she was likely to do so at this trial.

[47] Defense counsel in this case alluded vaguely to the "difficulty . . . with information . . . between the jurors" and to the possibility that information might "leak out." J.S. App. at 15a.

a minimum, to attend and hear what jurors will concededly be hearing.[48]

Nor can an order excluding the public from the trial, or any portion thereof, be justified by the fear that prejudicial testimony given outside the presence of the jury, or information acquired beyond the confines of the courtroom, might be transmitted to the jury. If the trial has begun, there are effective alternatives to a closure order —instructions that the jurors not discuss or read about the case and, if necessary, sequestration. See *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2905 n.5. Appropriate deference to the constitutional right to attend criminal trials requires that those alternatives be adopted. Indeed, to the extent that prejudicial information stems from previously held proceedings, or extra-judicial sources, the alternatives of special instructions and sequestration are the *only* effective safeguards against juror taint.

3. *Juror Distraction.*

The only reason affirmatively stated by the court for closing the trial in this case was that because of the "layout of the Courtroom," spectators would be "distracting to the jury." J.S. App. at 16a.[49] The court's

[48] One could always speculate that a criminal trial will result in a reversal because the judge erroneously admitted highly prejudicial inadmissible evidence. But even in that situation, it must be presumed that a judge has adequate means available to ensure that any retrial is conducted with all due deference to the defendant's rights. See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562-565 (1976); *Sheppard* v. *Maxwell*, 384 U.S. 333, 358-362 (1966). And any finding by a trial judge that evidence is admissible, but that his ruling on admissibility is so likely to be reversed that the public should be excluded from the trial, is inherently suspect.

[49] In light of the court's further observation that "the rule of the Court may be different" when it moved to a new building, "where people can sit in the audience so the jury can't see them," J.S. App. at 16a, it appears that the court closed an entire criminal trial for no reason other than the possibility of juror distraction.

further observation that "maybe that's not a very good reason" to exclude the public was, *amici* submit, closer to the mark.

The Hanover County courtroom is designed like thousands of courtrooms throughout the land,[50] in which hundreds of thousands of public trials have been conducted. A trial there is simply a "trial in a traditional courtroom under traditional conditions." *Estes* v. *Texas*, 381 U.S. at 595 (Harlan, J., concurring). The very notion that a defendant might not receive a fair trial because jurors will be "distracted" by silent spectators maintaining decorum in the courtroom is directly contrary to one of the fundamental premises underlying the public trial guarantee—that openness will cause all trial participants, including the jurors, to perform their duties more conscientiously. See, *e.g.*, *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2907. A trial judge, after all, has more than adequate power to prohibit actual disruptions, expel unruly spectators, instruct jurors about their solemn obligations to listen to the testimony and, if necessary, castigate a juror whose attention strays. The suggestion that an exclusion order may also be necessary or permissible to ensure an attentive jury is patently frivolous.[51]

[50] Like most courtrooms, it has a bar separating the area for spectators from the area where the trial participants are situated. As this Court has noted, the bar of the court is designed, among other things, "to protect the witness and the jury from any distractions, intrusions or influences." *Sheppard* v. *Maxwell*, 384 U.S. at 355.

[51] It might also be suggested that witness embarrassment about particular testimony might impede the search for the truth and thereby deprive the defendant of his right to a fair trial. *Cf. Geise* v. *United States*, 262 F.2d 151 (9th Cir. 1958). It is unnecessary for the Court to consider in this case whether the witness' interest would ever permit exclusion of the public. See note 36, *supra*. It is clear, however, that concern about the impact of a witness' embarrassment upon the quality of his testimony cannot justify the wholesale exclusion of the public. For it is inconceivable, *amici*

[Footnote continued on page 50]

The above considerations lead to the conclusion that, when proper deference is given to the right of the public to attend criminal trials, there can be no justification for abridging that right in the name of the defendant's right to a fair trial. The rights of the public and of the defendant are harmonious, and neither need be rendered subservient. Some of the arguments for closing a criminal trial simply do not seriously implicate the defendant's right to a fair trial, or, indeed, are contrary to the fundamental rationale of the public trial guarantee. Other concerns can be adequately dealt with by the courts through measures that do not infringe on the rights of the public. Indeed, in light of the court's power to sequester a jury and control the conduct of all spectators in the courtroom and all participants in the trial, *amici* submit that exclusion of the public from a criminal trial is never a constitutionally sanctioned method for safeguarding a defendant's right to a fair trial.

CONCLUSION

On the ground floor of Independence Hall in Philadelphia, there are two chambers. In the eastern chamber, the meeting place of the provincial Assembly, the Founding Fathers formulated and signed the Declaration of Independence and the Constitution of the United States. In the western chamber, the seat of various state and local courts, this Court held brief sessions during 1791 and 1796.

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submit, that a witness—required in any event to give testimony in the presence of the court, counsel, the defendant, the court reporter, other court officials and, in most cases, a cross-section of the public selected as jurors—would be so inhibited by the presence of some additional spectators, however few, as to deprive the defendant of his fair-trial right. Certainly, concern about the impact of the public's attendance on the quality of testimony can never justify exclusion of the public from an entire criminal trial.

These two famous chambers, though generally similar in shape and design, are separated not only by a magnificent hallway, but by the fundamentally different conceptions of their functions. Because the Assembly's sessions were sometimes held in secret, the eastern chamber was provided with a door. But the western chamber, where the courts sat and justice was administered, had no doors —that chamber was entered through open archways.

The open archways to justice in Independence Hall stood as silent witness to the faith of our forebears that the halls of justice must be open to all, and that tyranny, incompetence, malfeasance, and corruption can only flourish in secrecy. The open archways to justice stood as a public repudiation of the practices of the Court of Star Chamber and embodied our profound belief that no government, no legislature, no court, and no individual can deprive the public of the right to attend and observe the criminal trials of this Nation. They reflected the recognition not only that justice must be done, but also that the public has the right to observe first-hand that justice is being done, and that both the innocent accused and the heinous criminal are dealt with fairly.

The thought of secret trials, the hallmark of totalitarianism, has always been anathema to the fundamental precepts of our constitutional scheme. Inherent in the very concept of a criminal trial has been the notion that interested members of the public have a right to attend. And the proposition that the enjoyment of that right rests solely on the pleasure or whim of the trial participants, whose conduct is subject to scrutiny and control only when the public is present, has never before been seriously advanced. At this time in our Nation's history —when the effectiveness of the criminal justice system is being questioned as never before, when the competence of prosecutors, defense counsel and judges is constantly challenged, and when the fairness and justness of the ad-

versary system itself is under attack—the need for public knowledge and understanding of the criminal justice system is more vital than ever before. Now is not the time to allow that system to become shrouded in secrecy.

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
DEC 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,
Appellants,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY,
Appellants,

v.

RICHARD H.C. TAYLOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE IN SUPPORT OF APPELLANTS

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THE NATIONAL ASSOCIATION OF BROADCASTERS
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RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY, *Appellants,*

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RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY, *Appellants,*

v.

RICHARD H.C. TAYLOR, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AMICI CURIAE IN SUPPORT OF APPELLANTS

Amici curiae are seven national press organizations and one state press association. They support Appellants in seeking reversal of the judgment below.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press. As this Court knows, this Amicus has appeared in virtually every recent case before the Court involving restrictions on the ability of the press to report judicial proceedings.

The Associated Press Managing Editors is an organization of 600 editors of newspapers affiliated with the Associated Press, which is the largest news-gathering organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The National Association of Broadcasters (NAB) is a non-profit incorporated association of radio and television broadcast stations and networks. As of September 1, 1979, NAB's membership included 2587 AM radio stations, 2030 FM radio stations, 583 television stations, and all nationwide commercial broadcast networks. The object of NAB, according to its Bylaws:

> [S]hall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

Among NAB's primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a national organization of 5,500 newspapers with members in all 50 states. Its purpose is to preserve the constitutional guarantee of freedom of the press.

The National Press Club, the largest press club in the United States, is a broadly based journalistic organization. More than 1,200 active journalists, in all regions of the country, are members of the National Press Club.

The Radio-Television News Directors Association (RTNDA) is a non-profit professional organization of journalists. It includes approximately 1,500 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast by the national networks and by local radio and television stations throughout the nation.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization, of nearly 35,000 members representing every branch of print and broadcast journalism. It includes all ranks from student and beginning reporter to editor, publisher and broadcast executive. The Society works to preserve the public's right to know, to require that the public's business be conducted in public and to keep governmental records open to public inspection.

The Virginia Press Association is a non-profit corporation registered in the Commonwealth of Virginia representing a majority of the daily and weekly newspapers published in Virginia. The purpose of the Association is to expedite programs and activities furthering the editorial excellence of these newspapers and their service to the citizens of Virginia.

ARGUMENT

I. Gannett Should be Re-Examined

The Court has before it a case in which an entire criminal trial was closed to the press and the public. For all of the reasons stated by the Chief Justice in his concurring opinion in *Gannett Co.* v. *DePasquale,* 47 U.S.L.W. 4902 (July 2, 1979), by the four dissenting Justices in that case (*id.* at 4912), and in the briefs filed by Appellants and the other amici supporting them in the instant case, we respectfully urge the Court to rule explicitly that absent proof of a direct, immediate and irreparable injury to the administration of justice, criminal trials must remain open to the press and the public.

We do more, however, than merely add to the many voices pointing out all of the reasons why justice is best served by having criminal trials open to public inspection. We believe this is an appropriate case for the Court to address itself not only to criminal trials but to *all* judicial proceedings in a criminal case — pre-indictment, pretrial, trial, and post-trial alike. We submit, in other words, that the Court should re-evaluate *Gannett* and overturn the decision as it relates to pretrial hearings and to trials such as the one at issue in this case.

This is appropriate for several reasons:

1. Those joining in Mr. Justice Stewart's opinion in *Gannett* spoke in terms of criminal trials as much as they did in terms of pretrial hearings. In order to decide the instant case, they must, *perforce,* re-examine much of what they said by way of *dictum* in *Gannett.* As spelled out below, we believe that the reasoning applied

in *Gannett* both to criminal trials and to pretrial hearings will not withstand critical analysis and that therefore the press and public should be found to have a vested constitutional right to attend all types of judicial proceedings in a criminal case.

2. Great confusion has arisen among lower courts, the bar, the media and the public as to what *Gannett* means, and the case is being used as grounds for closing all types of criminal proceedings. Commentators[1] as well as members of the Court itself have made statements about what the case held, and these statements have not always been consistent one with the other. Whether the confusion has arisen, as some members of this Court have suggested, because of faulty reporting in the press, or, as a number of commentators have maintained, because of ambiguities and contradictions within the opinions themselves is no longer relevant. What is relevant — and what must be candidly addressed — is that for whatever reason, lower courts do not understand what *Gannett* holds, and as a result, a wide variety of actions are being taken for a wide variety of reasons, all ostensibly based upon *Gannett* but few of which bear any reasonable resemblance to what *Gannett* could possibly have sanctioned. A re-examination of that case, therefore, is peculiarly in order.

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[1] *E.g.,* Goodale, "Gannett: Loopholes May Send Case Way of Court's Other Aberrations," the Nat. Law J. (August 13, 1979); Goodale, "Gannett Means What It Says; But Who Knows What It Says?," The Nat. Law J. (October 15, 1979); Kamisar, "Another View of Gannett: Power Opinion Is Pivotal," The Nat. Law J. p. 14 (November 19, 1979); Prettyman, "Building Walls With Gannett," 4 District Lawyer No. 2, p. 37 (October/November 1979); Strobel, "Has Supreme Court Closed Down on Press?," Chicago Tribune (July 8, 1979); Zion, "High Court vs. The Press," The New York Times Magazine, p. 76 (November 18, 1979).

At the time the Amici filed their brief supporting the Jurisdictional Statement in this case, they were able to cite some 51 post-*Gannett* decisions relating to the attempted closure of courtrooms. That number has now grown to 109.[2] Of these, closures have been initially enforced or upheld on appeal in 61 cases, and refused or withdrawn in 43. The criminal proceedings sought to be closed include 11 pre-indictment proceedings, 74 pretrial proceedings, 20 trials, and four post-trial hearings. See 5 Med. L. Rep. No. 24 (November 20, 1979).

Among these have been instances in which:

– pretrial proceedings have been closed and transcripts sealed even though the prosecutors have taken no position on the issues before them.

– proceedings have been closed and records sealed even in the face of prosecutorial objection.

– the media, despite timely motions, have been denied all standing, as well as the right to intervene and present evidence.

– one or more co-defendants have made closure motions, while other co-defendants have either opposed the motions or remained silent.

– closure motions have been based upon possible publicity not in the pending cases but in unrelated cases.

– an entire probable cause hearing has been closed

[2]It is safe to assume that even this figure would be vastly greater but for the public statements during the summer and fall by various Justices warning that *Gannett* was being misinterpreted. These statements undoubtedly had a restraining effect upon many judges who otherwise might have been tempted to read the widest possible interpretation into the *Gannett* opinions.

Amici have lodged with the Clerk of the Court a summary of these cases, with accompanying citations.

because of possible personal embarrassment to the defendant.

– four proceedings have been closed to the press even though members of the public have been allowed to attend.

– a case has been dismissed because the defendants were thought to have been deprived of their "right" to a closed preliminary hearing.

– a United States Attorney has moved to seal proceedings over the objection of the accused.

– a motion to seal *pretrial* proceedings has resulted in an order sealing all proceedings until a verdict or other final disposition of the case.

– a witness has moved to close part of a trial because of possible prejudice to that witness in another trial on a related charge.

– a pretrial proceeding, parts of a trial and an entire trial have been closed because of possible embarrassment to rape victims.

– proceedings have been closed and records sealed merely upon motion of defendants and without any showing of prejudice, even in a murder case.

– attempts to close proceedings have been accompanied by direct prior restraints on the press in at least three instances.

– a hearing on whether a pretrial proceeding should be closed has itself been closed to the press and the public.

It seems obvious even from these few examples that regardless of what the Court intended, *Gannett* needs, at

the very least, clarification and redefinition before lower courts use it as a vehicle for changing the basic structure of this country's judicial system.[3] As noted above, however, we would earnestly hope that the instant case would become more than an opportunity to restate, in more direct and simplified terms, the precise holding in *Gannett* as to pretrial hearings. We would urge the Court to reconsider the underlying rationale of that case, to reverse its ruling outright as to such hearings, and to hold that pretrial as well as trial proceedings must remain open.

II. The Gannett Rationale Has Basic Flaws.

We respectfully submit that there were two basic flaws in the majority's approach to *Gannett:*

(a) While the Court purported to reject the concept that a defendant has a Sixth Amendment right to a "private trial," it failed to give a specific mandate to prosecutors and judges other than to protect a non-defined "societal interest," and as a result, proceedings are being closed despite the non-concurrence of, or even in the face of opposition by, prosecutors. Courts are thus assuming that because an accused has a constitutional right to an *open* trial, he can, by the simple device of waiver or

[3]Mr. Justice Stevens has said in a recent address that the "rules concerning access to trial proceedings * * * are exactly the same today as they were in 1973 and 1974," and that there is "no reason to believe that any trial judge or any prosecutor would have acted any differently [prior to *Gannett*] than he did if he had foreseen Gannett * * *." Stevens J., Address, The University of Arizona College of Law Dedication Ceremony, September 8, 1979. We can only respond, with the greatest deference, that the list of cases in the text demonstrates that the Justice's statements do not appear to reflect the same perceptions as the judges and prosecutors on the firing line. Even the few examples cited above represent vast departures from the law as it was almost universally interpreted and applied prior to *Gannett*.

motion, convert that into a right to a *closed* trial, as if no other interests were at stake. The existence of the obverse right does not necessarily connote the existence of the reverse one, for the Constitution nowhere speaks in terms of a right to a closed trial.

To take a simple example: this Court has consistently held, beginning with *Strauder* v. *West Virginia,* 100 U.S. 303 (1880), that discrimination against jurors based on race is forbidden by the Fourteenth Amendment. It has more recently held that women cannot be excluded from juries, based on their sex. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975); *Duren* v. *Missouri,* 47 U.S.L.W. 4089 (U.S. January 9, 1979).

Would this Court hold that the defendant below, by simply waiving his right to have his jury selected in a non-discriminatory manner, thereby allowed the trial judge affirmatively to exclude all blacks and women from the list of potential jurors? Would this Court tolerate a system of justice based on racial or sexual discrimination, simply at the behest of the defendant? Would this Court tell black or female residents of Hanover County that they have "no standing" to be part of the jury pool and to participate equally in the criminal justice system on the same basis as their neighbors, whatever the reason offered by the defendant?

We do not wish to belabor the point, but a logical extension of Mr. Justice Stewart's decision could lead to the most extreme and bizarre results. Would a judge stand mutely by if a defendant made no objection to testimony against him by a witness who had been tortured? For that matter, suppose a masochist defendant demanded to be tortured before he would willingly confess; would this Court sanction the torture and subse-

quent use of the confession on the theory that the defendant had waived his due process right to have a confession taken from him by peaceful means?

The simple answer to all these hypothetical situations is that there are some aspects of the criminal justice system which are so fundamental that they cannot be waived because the rights of others — particularly the public — are also involved.

The difficulty with the analysis in *Gannett* is that the criminal justice system is treated as some sort of private commercial contractual arrangement where rights can be asserted or waived only by parties at interest, and where there is no standing in the public and the press because they are not initially or formally parties to the proceedings. For all of the reasons asserted by the Appellants and the other amici, the press and the public have a paramount interest in observing the functioning of their courts.[4]

The fact that a defendant can force a proceeding to remain open should not by any extension of law or logic suggest that he has a comparable right to close it down, any more than his right to an impartial jury selected from a cross-section of the community gives him a right to exclude blacks or women. There are simply certain

[4]Perhaps these reasons were best summarized in the concurring opinion of Chief Justice Cooke of the New York Court of Appeals, the same court that originally decided *Gannett*. He said:

> * * * public proceedings protect the rights of the defendant by safeguarding against attempts to employ courts as instruments of persecution (see *People* v *Jones*, 47 NY2d 409, 413, cert den __ US __). And, in a larger sense, public scrutiny of all involved in the criminal justice system serves at once as a deterrent to partial justice and fosters a sense of confidence and respect on the part of the public in that system. In short, open judicial proceedings serve "to guarantee the fairness of

standards inherent in our criminal justice system which cannot be made to rest on the waiver of rights by defendants — with or without the concurrence of prosecutors and judges — because these parties are not the only members of the community with a vital interest in the operation of the criminal justice system.

(b) The Court also erred in *Gannett* in treating the open courtroom issue as solely one of *access*. We too would urge, for reasons stated by others, that there is both a First and Sixth Amendment right in the press and the public to be present at judicial proceedings. But whether or not one accepts these arguments, that should not end the matter.

All members of this Court in *Gannett* limited their comments to the presence or absence of a First or Sixth Amendment right of access by the press and public. It was as if the forum sought to be entered was a prison, a grand jury room, or an executive session of the Senate Foreign Relations Committee — forums which have traditionally, and usually for good cause, been closed.

But that is not the nature of what is being sought here. The press and public are not trying to force their way into places normally forbidden to them. Whether the open courtroom stems from the rights of a free people reserved to them through the Ninth Amendment, as

> trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice" (*Cox Broadcasting Corp.* v *Cohn*, 420 US 469, 492). [*Westchester Rockland Newspapers, Inc.* v. *Leggett*, No. 484, November 20, 1979, slip opinion at 1-2.]

Interestingly, in the *Leggett* case, New York's highest court drew back from any extension of the *Gannett* rationale and unanimously held, with one judge not participating, that even a pretrial mental competency hearing in a rape case had to remain open despite a claim of prejudice by the defendant.

argued by the American Newspaper Publisher Association and the American Society of Newspaper Editors, or whether it is an integral link in our common law heritage, or whether it is simply a part of a legal system that so benefits all our citizens that it cannot be waived by any one of them, the result is the same: courtrooms must remain open in all but the most extraordinary circumstances because only in that way can we guarantee justice and thus assure our continance as a free people.

The true analysis should not focus exclusively on a defendant's Sixth Amendment right versus a Sixth or First Amendment right on behalf of the public and press. Instead, it should recognize that "the concept of a secret trial is anathema to the social and political philosophy which motivates our society * * *." *People* v. *Jones,* 47 N.Y.2d 409, 413, 391 N.E.2d 1335, 1338 (N.Y. Ct. App.), *cert. denied,* 48 U.S.L.W. 3309 (U.S. November 5, 1979). As said in another context, there is imposed "upon this Court an exercise of judgment upon the whole course of the [criminal justice] proceedings * * * in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples * * * ." *Malinski* v. *New York,* 324 U.S. 401, 416 (1945). Secret probable cause hearings, secret pretrial proceedings, secret trials and secret post-conviction hearings, because of their extraordinary import, constitute nothing less than "conduct that shocks the conscience" because they are "calculated to discredit law and thereby to brutalize the temper of society." *Rochin* v. *California,* 342 U.S. 165, 172, 174 (1952).

As noted above, the justification for this result could rest on various analyses, so long as it focuses on the larger issues. Thus, a persuasive argument has been

made in one article (n.9, *infra*) that the closed judicial proceeding is nothing more or less than a prior restraint on the press, no matter which test or standard is used for determining whether a particular order constitutes a prior restraint. 57 Neb. L. Rev. at 460-475. The authors conclude, in fact, that the breadth of a closure order is "greater * * * than the gag order unanimously declared unconstitutional in *Nebraska Press Association.*" *Id.* at 464; see also 473. We will not repeat here the reasoning employed in their article, but will merely note that their position would appear to be unassailable from the standpoint of both logic and precedent.

Similarly, amici, in their brief supporting the granting of a hearing in this case, argued that a court closure is no different than the exclusion of the public from a public forum which the people have a vested right to attend. "Brief Amici Curiae in Support of Jurisdictional Statement" at 21-28. Again, we will not repeat here each of the arguments made there. Suffice it to say that, based on such cases as *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1974), *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971), *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175 (1968), and *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), it is clear that what goes on in a courtroom is a political expression on issues of the highest importance to the public and therefore entitled to the same protection accorded the public forum demonstrations, the picketing and the musical involved in those cases.

The significance of each of these arguments is that they do not depend upon finding some discrete, individual and identifiable constitutional right for each member of the press or public before a courtroom is

allowed to remain open. The courtroom remains open because society as a whole has a vital stake in making certain that justice is not administered in secret.

III. There Are Alternatives to Closure.

It is because of this larger context, this greater dimension, of the effect of closure that one must look for alternatives to closure.

> * * * [A]n open judicial proceeding is a necessary correlative to a free and open society. Thus, before any proceeding is closed, the proponent of the closure order must establish that there exist no other less restrictive protective measures available to assure a fair trial. In short, the right of the public to attend judicial proceedings ends only where the defendant's right to trial by an impartial jury is unalterably threatened. [Cooke, Ch.J., concurring, *Westchester Rockland Newspapers, Inc.* v. *Leggett, supra,* slip opinion at 3.]

Here, as in *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976), there are alternative means of dealing with any potential prejudice to the accused. In the context of a trial, sequestration is always available, and if it is argued that sequestration is burdensome and costly and should be reserved for the extraordinary case, the answer is that in only such an extraordinary case can it possibly be said that publicity will, with any assurance, have some perceivable adverse effect on a jury.[5]

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[5] *Irvin* v. *Dowd,* 366 U.S. 717, 722-723 (1961); *Murphy* v. *Florida,* 421 U.S. 794, 799-800 (1975); *Lutwak* v. *United States,* 344 U.S. 604, 619 (1953); *Holt* v. *United States,* 218 U.S. 245, 248 (1910).

As one judge has pointed out, "there is no problem at all in the great majority of the hundreds of thousands of criminal cases which are brought each year in this country because less than one percent of the cases are even given a line of notice in the press and of that one percent seventy-five to ninety percent plead guilty. So * * * what is involved is a small faction of the less than one percent of the criminal trials brought." See A. Cox, M. Howe, & J.R. Wiggins, *Civil Rights, The Constitution and the Courts,* 56, 70-71 (1967).

If the context is a pre-conviction or pretrial hearing, all of the less restrictive alternatives suggested by *Nebraska Press Ass'n* v. *Stuart, supra,* 427 U.S. at 562-565, and its predecessor cases are available: voir dire, change of venire, change of venue, continuance, instructions, mistrials, new trials and reversals. Certainly the burden is on one attempting to close a courtroom to show that all of these alternatives are ineffective, a burden which the defendant in the instant case did not attempt to meet.

The defendant here did not show that an open courtroom would result in a denial of his rights, or that closing the courtroom would protect his rights. Yet such showings are essential before closures can even be considered.

IV. There Must Be Notice, A Meaningful Hearing, and A Chance To Appeal.

This Court's cases make clear that even preliminary nonfinal decisions which merely *threaten* First Amendment rights must afford those so threatened with notice and an opportunity to be heard and to present evidence. *E.g., Carroll* v. *President and Commissioners of Princess Anne, supra; Smith* v. *Organization of Foster Families,* 431 U.S. 816 (1977); *Freedman* v. *Maryland,* 380 U.S. 51 (1965). See also McKay, *The Preference for Freedom,* 34 N.Y.U.L. Rev. 1182, 1219 (1959).

In this regard, both Mr. Justice Stewart's and Mr. Justice Powell's opinion in *Gannett* assumed that whatever First Amendment right was involved, it had been protected by the trial judge's actions in that case. But what actually occurred was that when the closure order was announced, no member of the press or public objected, the suppression hearing was held in private, and only after it had been completed and the press objected the following day was any kind of "hearing" held on the closure order.

As for the public, is it at all realistic to assume that any layman is going to stand up in a courtroom, before or after a judge's order is entered, and object to that order? Can the closing of our courtrooms really rest upon so slender a reed? And as for the press, it is quite true that reporters from our largest media can be forewarned, can even be furnished with cards that express an objection in legal language and a demand to be heard, so that when a closure motion is mentioned, they can rise and read their objections. But again, is it either fair or realistic to expect reporters from the small dailies, the weeklies, country radio stations and the like to be prepared in this fashion? And regardless of which type of media organization is represented, what is to be done when the closure motion is heard and ruled upon in private, either by design or because no member of the press happens to be present when the motion is made? The closing of courtrooms is made to depend, under these rulings, upon either sheer chance or the ingenuity of the lawyers seeking to close the courtrooms.[6]

[6]The Court will note from the above recitation of examples of what has occurred since *Gannett* that a number of courts have allowed the media (and presumably the public) no standing at all to object to closure orders or to present evidence rebutting the position of the accused. These courts seem to have reasoned that since, under *Gannett,* the media and the public have no First or Sixth Amendment rights at stake, only the accused and the prosecutor are parties to the closure hearing. A logical extension of this conclusion is that neither the press nor the public can appeal an adverse ruling, so that where a prosecutor fails to take a stand, there can be no appellate testing of the closure order. While we strongly believe, as argued elsewhere in this brief, that the rights of the press and the public are, at the very least, sufficiently threatened to accord standing and the right to appeal, we strongly urge the Court to make explicitly clear that no closure order can be entered until fair notice and an opportunity to be heard have been afforded representatives of the press and public, and that closure orders are instantly appealable by any representative of the press or public, regardless of whether that representative happens to be present when the order is entered.

The above assumes, of course, that a hearing, once properly invoked, will be a meaningful one. Experience has proven otherwise. What is actually happening is that defense attorneys are displaying to trial judges one or more news stories about their clients and claiming potential prejudicial publicity, prosecutors are taking no position at all or joining in the closure motions,[7] and trial judges are all too often citing *Gannett* and closing their courtrooms as if no other alternatives are open to

[7]The Court apparently failed to appreciate not only that many prosecutors would rather maintain a neutral position than take the chance of being reversed on appeal, but that supporting closure motions might actually run into conflict with prosecutorial trial positions. This latter point is illustrated by *United States* v. *Powers,* S.D. Iowa, Crim. No. 79-26 (September 7, 1979), in which the defendant moved to exclude the public on the theory that the people he would testify about as part of his defense were so violent that his own life and those of his family were in danger. The United States, of course, was taking the position that these persons were not violent, and therefore, as the court noted, "the defendant has shown that the prosecution would never consent to the closure because the issue before the Court focuses on a possible defense to the prosecution's charges against the defendant." Slip Opinion at 3.

them. This Court's admonition that courts and prosecutors must protect "the societal interest" is being largely ignored, in no small part because under the *Gannett* opinions it is not perceived what "the societal interest" is that must be protected.

We submit that the press and the public should not have to submit their rights to open courtrooms to the whims, caprices or motives of defendants and prosecutors. The right should stand unabused, absent the most extraordinary showing not only that closure is absolutely essential but that no other alternative is available. And closure should not depend on whether a member of the press or public happens to be on hand to assert the right.

V. Only Open Proceedings Will Reveal the Entire Judicial Process As It Actually Operates and Assure Accurate News Reports to the Public.

One does not have to be in favor of televising judicial proceedings in order to appreciate the force and cogency of a trial judge's remarks in a report to the Supreme Court of Florida following a trial which he had conducted and which was televised. He said in part:

> The judge's conduct in the course of a trial should not be screened from public scrutiny. This is especially true since the judicial branch of government is the only bulwark that stands as a shield between the people and the executive sword. The public has a right to know whether a judge is decisive or indecisive, attentive or inattentive, courteous or rude, whether or not he can maintain control over the trial proceedings and if he appears learned or confused. To this extent it makes little difference

> whether the judge is observed by spectators in the courtroom or by spectators viewing television.[8]

Later in his report (pp. 20-21), the judge expanded upon the same thesis: "The printed record standing alone does not indicate voice inflections, facial expressions, a witness's demeanor, the demeanor of the trial judge or the conduct of counsel."

Here, we submit, is part of the case to be made for open trials that was ignored in *Gannett*. The briefs supporting open pretrial hearings in that case stressed the importance of the crucial events that often occur at such hearings – the secret deals, the failure to press for prosecution where prosecution is clearly called for, the vindictive or repressive acts of a judge or prosecutor, the failure to defend effectively. But there is more to be observed than the occasional, aberrant act of a system gone wrong.[9] As the Florida judge implied, even the

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[8]Report to the Supreme Court of Florida re: Conduct of Audio-Visual Trial Coverage (undated), following *Florida* v. *Zamora*, Circuit Court, Eleventh Judicial Circuit of Florida, Criminal Division, Case No. 77-25123-A, at 15-16.

[9]We do not mean to denigrate the importance of public scrutiny because of the possibility of corruption or malice. As one court has noted:

> Because of corruption or malice, a secret judicial proceeding may be and has been used to railroad accused persons charged with crime. Secret proceedings may be used to cover up for incompetent or corrupt police, prosecutors and judges, and the influence of corrupt politicians on the judicial system. [*State ex rel. Dayton Newspapers, Inc.* v. *Phillips*, 46 Ohio St.2d 457, 466-467, 351 N.E.2d 127, 133-134 (1976).]

See also Fenner and Koley, "The Rights of the Press and the Closed Court Criminal Proceeding," 57 Neb. L. Rev. 442, 447 (1978), where the authors ask: "What about the judge, for example, whose

judge or attorney not bent on nefarious deeds can nevertheless so conduct himself or herself that justice is betrayed. And, most importantly, such conduct may never appear in the public record — the sly smile, the wink, the derisive tone, the look of disbelief and other facial expressions. Whether or not intended, these seemingly innocuous mannerisms, particularly if habitual, can have a profound effect on witnesses and jurors.

Still another point was either overlooked or given insufficient attention in *Gannett*. The media, by one method or another, is going to attempt to discover and report what occurred at any closed judicial proceeding. Since a direct prior restraint on the press is impermissible under such circumstances,[10] and since attempts to prevent trial participants from talking, whether or not constitutionally permissible,[11] have often proven ineffective, we can assume that many closed proceedings will be reported in one fashion or another. It is a simple fact of common experience that the media's chances of *accurately* reporting what has occurred are increased by personal observance of the actual events, whereas the same chances are diminished by reports based on what has been picked up from third parties who, either through faulty observance or because of bias, may not be relating events as they actually happened.

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fear of exposure or personal animosity towards the press leads him to routinely close criminal action proceedings as a means of personal defense?" (footnote deleted).

[10] *Nebraska Press Ass'n* v. *Stuart, supra; Oklahoma Pub. Co.* v. *District Court,* 430 U.S. 308 (1977) (per curiam).

[11] *See In re Halkin,* 598 F.2d 176 (D.C. Cir. 1979); *CBS, Inc.* v. *Young,* 522 F.2d 234, 240 (6th Cir. 1975); *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham* v. *Chicago Council of Lawyers,* 427 U.S. 912 (1976).

Thus, the result of closed courtrooms has far-reaching adverse implications. The more second-hand the reporting, the more likelihood of error; the more likelihood of error, the less informed the public, and the greater the risk that persons even remotely involved will consider themselves damaged by inaccuracies or misrepresentations, with a resulting chilling effect on all reporting — not only of that material which the court was attempting to keep from the public in the first place, but of all facts surrounding the closed proceeding.

And so it is that judicial proceedings must remain open not because of public curiosity, not because the media derive profit from reporting the news, and not merely because our people are entitled to know the key events that transpire when justice is administered. Courts must remain open because that is the only way the totality of judicial proceedings can be observed. With courts open, judges will be more attentive to their business, more courteous, more impartial in word, deed and expression, more circumspect in their language, more sensitive to the needs of minorities and the afflicted. Attorneys on both sides will be more respectful, better prepared, more careful in their representations of fact and law, more courteous, and in all respects better officers of the court. Thus, there will be two juries: the one in the box determining the fate of the accused, and the one in the audience passing judgment on the over-all performance of our court system, making certain that in all respects justice is in fact being carried out.[12]

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[12] As one judge has put it, "a transcript of a proceeding is a sterile substitute for observing the actual conduct of a hearing, as reviewing courts are well aware. Actual observation of the de-

For each of these reasons — of policy and of law — we respectfully urge the Court not to allow the lower courts to effectuate a basic transformation of the judicial system in this country. Our courts can deal with the possibility of prejudicial publicity, embarrassment to witnesses, jury distractions, threats on persons' lives, and the myriad other reasons proffered for closing courtrooms; they have a multitude of devices and means available for meeting these contingencies short of closing their doors. But the public has no redress once those doors are closed. No second-hand version or delayed transcript will take the place of a first-hand view, or of an accurate, complete and contemporaneous report, of what transpired in court.[13] If the doors close, the people

meanor, voice, and gestures of the participants in a hearing must be as informative to the press and public as those same matters are to juries during trial." *State ex rel. Newspapers, Inc.* v. *Phillips, supra,* 46 Ohio St. at 471, 351 N.E.2d at 136 (Stern, J., concurring). This is part of making certain that "justice must not only be done but must manifestly be seen to be done * * *." Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U.S. 123, 170-172 (1951), and quoting from *Rex* v. *Justices of Bodmin* [1947] 1 K.B. 321, 325 (1946). Moreover, as noted by Fenner and Koley, *supra,* a cold record presented to newsmen after the event relates to proceedings "which by then are no longer news, but history" (57 Neb. L. Rev. at 454; footnote deleted), or which have become "obsolete or unprofitable." Emerson, *The Doctrine of Prior Restraint,* 20 Law and Contemp. Prob. 648, 657 (1955).

[13]Obtaining a transcript of proceedings after those proceedings are concluded is not a practical solution for other reasons as well. The media in most important cases have to pay to have the court reporter's notes transcribed, which may be burdensome to the reporter, is more expensive the longer the proceeding, and often results in inordinate delay. If a tape recording is available, it usually has gaps or is otherwise in part unintelligible. Thus, there is no effective and practical way of learning what went on in a closed hearing without undue expense and delay, even if the transcript or recording fully revealed what had occurred — which they do not.

will have lost a precious part of their governmental heritage: the right to *witness* justice in action and thus to pass judgment on whether, in fact, it is justice that our courts are dispensing.

CONCLUSION

For all of the above reasons, Amicus Curiae respectfully urge the Court to hold that in the absence of proof of a direct, immediate and irreparable injury to the administration of justice, criminal trials in this country must remain open. We also urge the Court to reexamine the Court's rationale in *Gannett* and to hold that the same criteria apply to the closing of *all* judicial proceedings, whenever and wherever held.

Respectfully submitted,

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